S. Hrg. 101-47

EMPLOYEE HEALTH AND SAFETY WHISTLEBLOWER PROTECTION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 436

TO STRENGTHEN THE PROTECTIONS AVAILABLE TO EMPLOYEES AGAINST REPRISALS FOR DISCLOSING INFORMATION, TO PROTECT THE PUBLIC HEALTH AND SAFETY, AND FOR OTHER PURPOSES

MARCH 7, 1989

Printed for the use of the Committee on Labor and Human Resources

U.S. GOVERNMENT PRINTING OFFICE
96-703 WASHINGTON : 1989

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S541-23

COMMITTEE ON LABOR AND HUMAN RESOURCES

EDWARD M. KENNEDY, Massachusetts, *Chairman*

CLAIBORNE PELL, Rhode Island
HOWARD M. METZENBAUM, Ohio
SPARK M. MATSUNAGA, Hawaii
CHRISTOPHER J. DODD, Connecticut
PAUL SIMON, Illinois
TOM HARKIN, Iowa
BROCK ADAMS, Washington
BARBARA A. MIKULSKI, Maryland

ORRIN G. HATCH, Utah
NANCY LANDON KASSEBAUM, Kansas
JIM JEFFORDS, Vermont
DAN COATS, Indiana
STROM THURMOND, South Carolina
DAVE DURENBERGER, Minnesota
THAD COCHRAN, Mississippi

Nick Littlefield, *Staff Director and Chief Counsel*
Kristine A. Iverson, *Minority Staff Director*

Subcommittee on Labor

HOWARD M. METZENBAUM, Ohio, *Chairman*

SPARK M. MATSUNAGA, Hawaii
TOM HARKIN, Iowa
BARBARA A. MIKULSKI, Maryland
EDWARD M. KENNEDY, Massachusetts
(Ex Officio)

JIM JEFFORDS, Vermont
THAD COCHRAN, Mississippi
STROM THURMOND, South Carolina
ORRIN G. HATCH, Utah
(Ex Officio)

James J. Brudney, *Chief Counsel*
Reginald E. Jones, *Minority Counsel*

CONTENTS

STATEMENTS

Tuesday, March 7, 1989

Page

Adams, Hon. Brock, a U.S. Senator from the State of Washington, prepared statement 57

American Federation of State, County, and Municipal Employees, AFL-CIO, prepared statement 294

Bianchi-Sand, Susan, national president, Association of Flight Attendants, AFL-CIO, prepared statement 301

Bourland, Albert D., vice president of congressional relations, U.S. Chamber of Commerce, prepared statement 214

Duffy, Capt. Henry, president, Air Line Pilots Association, Washington, DC, accompanied by Jim Johnson, legal counsel 40
  Prepared statement of Captain Duffy 44

Fidell, Eugene R., prepared statement (with enclosures) 201

Frankovich, Victorial, president, Independent Federation of Flight Attendants, prepared statement 299

Foreman, Carol Tucker, partner, Foreman & Heidepriem, and former Assistant Secretary of Agriculture, Washington, DC; and Thomas Devine, legal director, Government Accountability Project, Washington, DC 90
  Prepared statements of:
    Ms. Foreman 94
    Mr. Devine 103

Grassley, Hon. Charles E., a U.S. Senator from the State of Iowa 37

Harbrant, Robert F., president, Food & Allied Service Trades, prepared statement 259

Metzenbaum, Hon. Howard M., a U.S. Senator from the State of Ohio, prepared statement 3

Molpus, C. Manly, president and C.E.O., American Meat Institute, prepared statement 245

National Association of Manufacturers, prepared statement 229

Salgado, Joseph F., prepared statement 59

Scheri, William L., airline coordinator, International Association of Machinists and Aerospace Workers, prepared statement 216

Simpkin, James W., Loveland, CO; William Donald Wright, Enterprise, AL, and Donald S. Henley, Jr., Ashboro, NC 55
  Prepared statement of Mr. Henley 80

Sweeney, David A., director, department of legislation, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, prepared statement 250

Thorn, Jerry G., Acting Solicitor of Labor, U.S. Department of Labor, Washington, DC 50

Watts, George B., president, National Broiler Council, prepared statement 208

ADDITIONAL MATERIAL

Articles, publications, etc.:

  Text of S. 436 as introduced 5
  Summary of Employee Health and Safety Whistleblower Protection Act 28
  Section-by-section analysis of S. 436, the Employee Health and Safety Whistleblower Protection Act 30

Articles, publications, etc.—Continued | Page
  Federal Protection of Private Sector Health and Safety Whistleblowers, a report to the Administrative Conference of the United States, by Eugene R. Fidell, partner, Klores, Feldesman & Tucker, February 1987. 116
  Commentary on S. 436 by Nicholas S. Reynolds 260
Communications:
  Wilson, Gordon C., Area Director, Employment Standards Administration, Wage and Hour Division, U.S. Department of Labor, from Jim Simpkin, June 29, 1988 (with an attachment) 66

EMPLOYEE HEALTH AND SAFETY WHISTLEBLOWER PROTECTION ACT

TUESDAY, MARCH 7, 1989

U.S. Senate,
Subcommittee on Labor,
Committee on Labor and Human Resources,
Washington, DC.

The subcommittee convened, pursuant to notice, at 9:40 a.m., in room SD-430, Dirksen Senate Office Building, Senator Howard M. Metzenbaum (chairman of the subcommittee) presiding.

Present: Senators Metzenbaum and Harkin.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator Metzenbaum. Good morning.

Today's hearing is on S. 436, the Employee Health and Safety Whistleblower Protection Act. Unfortunately, this bill is all too timely. As a matter of fact, after we had scheduled this hearing, it came to my attention that CBS News reported on a Michael Thompson, an assemblyline worker who lost his job because he reported falsified inspection records by a Government contractor, just this past Sunday night.

The fact is we live in a dangerous world. In recent months, we have seen geriatric airplanes fall apart in mid-air, with tragic loss of life. Contaminated nuclear facilities all over the country, including one in my own State of Ohio, threaten the health of workers and their communities and undermine our national security.

Serious concerns have been raised about the safety of food—from tainted meat to unregulated seafood to fruits and vegetables treated with potentially lethal pesticides.

There is a common thread that unites these seemingly unrelated incidents. Workers in each industry—aviation, nuclear weapons production, food processing, and pesticide application—have no Federal statutory protection from reprisal if they report health or safety violations to the proper authorities.

When workers blow the whistle on unlawful or dangerous activities that threaten the public health or safety, they deserve a medal. Too often, they get a "pink slip" or are harassed, demoted, intimidated, or blacklisted.

The fear of reprisal has silenced many workers who otherwise could help Federal authorities enforce our health and safety laws.

This situation is intolerable. This bill protects workers from unjust retaliation. It provides a Federal statutory remedy to employees who currently have no such remedy when they are fired, harassed, intimidated, demoted or discriminated against for reporting violations of Federal health or safety laws.

I have worked closely with my lead cosponsor, Senator Grassley of Iowa, to craft a bill that provides necessary protections for workers and includes procedural safeguards to ensure expedited, fair resolution of complaints.

I would ask that the text of the bill, a summary of the bill, a section-by-section analysis of the bill, and the Administrative Conference recommendation and report that served as the basis for the bill be included in the record of this hearing.

We will hear a range of testimony this morning. I am pleased that my colleagues Senator Harkin and Senator Grassley are here. Senator Grassley has been a staunch protector of the rights of whistleblowers. Senator Harkin has continued to evidence real concern on this matter, and I know at some inconvenience to himself, because of other committee meetings this morning, he has seen fit to be with us today, and we are very happy to have him with us.

I look forward to hearing from the Department of Labor. The Metzenbaum-Grassley bill incorporates a number of the Department's suggestions to improve administrative procedures.

I also want to welcome the labor and consumer representatives here to testify on the bill.

And finally, I want to welcome the courageous whistleblowers who will tell us their stories. They put their careers on the line so that we could all be a little safer. The man on the television news—I think his name was Thompson—did the same thing. I believe that all of them demonstrate why we need this legislation.

[Following are the prepared statement of Senator Metzenbaum, text of S. 436, summary of the bill, and a section-by-section analysis of the bill. The Administrative Conference recommendations and report referred to will appear in the record at the conclusion of testimony of all witnesses.]

U.S. Senator Howard M.
METZENBAUM
of Ohio

Judiciary
Labor and Human Resources
Energy and Natural Resources
Select Committee on Intelligence

Chairmanships:
Subcommittee on Antitrust
Subcommittee on Labor
Subcommittee on Energy
Regulation and Conservation

Opening Statement of Senator Howard M. Metzenbaum at the Labor Subcommittee Hearing on S. 436, the Employee Health and Safety Whistleblower Protection Act

March 7, 1989

Good morning. Today's hearing is on S. 436, the Employee Health and Safety Whistleblower Protection Act. Unfortunately, this bill is all too timely. Just this weekend, CBS News reported on Michael Thompson, an assembly-line worker who lost his job because he reported falsified inspection records by a government contractor.

We live in a dangerous world. In recent months, we have seen geriatic airplanes fall apart in mid-air with tragic loss of life. Contaminated nuclear weapons facilities all over this country, including one in my own state of Ohio, threaten the health of workers and their communities and undermine our national security. Serious concerns have been raised about the safety of food--from tainted meat, to unregulated seafood, to fruits and vegetables treated with potentially lethal pesticides.

There is a common thread that unites these seemingly unrelated incidents. Workers in each industry--aviation, nuclear weapons production, food processing, and pesticide application--have no federal statutory protection from reprisal if they report health or safety violations to the proper authorities. When workers "blow the whistle" on unlawful or dangerous activities that threaten the public health or safety, they deserve a medal. Too often, they get a "pink slip" or they are harassed, demoted intimidated or blacklisted. The fear of reprisal has silenced many workers who otherwise could help federal authorities enforce our health and safety laws.

This situation is intolerable. Last year, at a hearing on an earlier version of this bill, a young pilot who was fired for refusing to fly planes that failed to meet minimum federal safety standards testified. I asked him whether he would advise other pilots to blow the whistle on safety violations. His answer was honest, but disturbing--he was reluctant to recommend whistleblowing to other pilots unless they could "afford the luxury of being courageous."

Reporting health or safety violations should not be a "luxury". Reporting those violations is an obligation of citizenship. And it is up to the federal government to protect its citizens when they stand up and do the right thing by telling the truth.

That is what this bill is all about. It provides a federal statutory remedy to employees, who currently have no such remedy, when they are fired, harassed, intimidated, demoted or discriminated against for reporting violations of federal health or safety laws. I have worked closely with my lead cosponsor, Senator Grassley of Iowa, to craft a bill that provides necessary protections for workers and includes procedural safeguards to ensure expedited, fair resolution of complaints.

We have been guided by a detailed study on this subject by the Administrative Conference of the United States. That study found that current federal whistleblower laws are a patchwork collection with glaring loopholes and procedural inconsistencies. This bill eliminates the gaps in coverage and corrects two particularly troublesome procedures.

Because of current gaps in coverage, millions of workers in the critical public safety industries I already mentioned plus others, such as government contractor employees and certain state and local employees, have no federal statutory remedy for health and safety whistleblowing. This bill provides a federal remedy to those unprotected workers.

In addition, those workers who are protected under current federal law face unrealistic time limits--some as short as 30 days--to file a complaint. The bill corrects this inequity by creating a uniform 180-day statute of limitations for all health and safety whistleblower complaints.

Moreover, the Department of Labor, which has the responsibility to process the majority of whistleblower complaints, too often lacks the authority to conduct meaningful investigations. We remedy that situation by providing the Secretary of Labor with subpoena power to investigate complaints.

Let me be clear about the limited scope of this bill. It does not expand substantive protection for any whistleblower covered by current federal statute. Coal miners and truck drivers, for example, have an existing federal remedy and will not be affected by this initiative. The bill merely helps those workers who have been left out in the cold.

We will hear a range of testimony this morning. I am pleased that my colleague Senator Grassley is here. He has been a staunch protector of the rights of whistleblowers. I look forward to hearing from the Department of Labor. The Metzenbaum-Grassley bill incorporates a number of the Department's suggestions to improve administrative procedures. I also want to welcome the labor and consumer representatives here to testify on the bill. Finally, I want to welcome the courageous whistleblowers who will tell us their stories. They put their careers on the line so that we could all be a little safer. I believe they will demonstrate why we need this bill.

II

101st CONGRESS
1st Session

S. 436

To strengthen the protections available to employees against reprisals for disclosing information, to protect the public health and safety, and for other purposes.

IN THE SENATE OF THE UNITED STATES

February 23 (legislative day, January 3), 1989

Mr. Metzenbaum (for himself, Mr. Grassley, Mr. Simon, Mr. Pell, Mr. Dodd, Ms. Mikulski, Mr. Harkin, Mr. Levin, and Mr. Kennedy) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

---

A BILL

To strengthen the protections available to employees against reprisals for disclosing information, to protect the public health and safety, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Employee Health and Safety Whistleblower Protection Act".

SEC. 2. FINDINGS AND PURPOSES.

(a) Findings.—Congress finds that—

(1) employees who report unlawful or hazardous activities are performing an important public service by helping ensure the health and safety of workers and the general public;

(2) employees should be able to report unlawful or hazardous activities without fear of reprisal; and

(3) employees who make such reports are not adequately protected against reprisal by the current Federal laws designed to protect private sector whistleblowers.

(b) PURPOSE.—The purpose of this Act is to strengthen and improve protection for employees who report unlawful or hazardous activities, to prevent retaliation against employees, and to improve the health and safety of workers and the general public by—

(1) extending whistleblower protection regarding health and safety matters to all employees not currently protected by Federal law;

(2) creating a uniform statute of limitations for all whistleblower complaints by private sector employees;

(3) ensuring that the Secretary of Labor has subpoena power to investigate whistleblower complaints;

(4) providing for a limited private right of action for certain whistleblower complaints; and

(5) ensuring that reports of unlawful or hazardous activities are referred to the appropriate Federal agencies for investigation.

SEC. 3. DEFINITIONS.

As used in this Act—

(1) COMMERCE.—The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States, or between points in the same State but through a point outside thereof.

(2) EMPLOYEE.—The term "employee" means any individual who is employed by an employer, or who is a former employee of an employer, to the extent that—

(A) such individual is discharged or discriminated against for any of the conduct described in section 4; and

(B) no remedy is available to such individual for such discharge or discrimination under an existing Federal whistleblower protection law.

(3) EMPLOYER.—The term "employer"—

(A) means a person engaged in a business affecting commerce who has employees;

(B) includes—

(i) a State or political subdivision of a State, or an interstate governmental agency; and

(ii) an agent of an employer and an employer of an employer; and

(C) does not include the United States, except for a government corporation (as defined in section 103(1) of title 5, United States Code) and the United States Postal Service.

(4) EXISTING FEDERAL WHISTLEBLOWER PROTECTION LAW.—The term "existing Federal whistleblower protection law" means those provisions of Federal law that protect employees against discharge or discrimination for any of the conduct described in section 4, that are contained in—

(A) section 942 of Department of Defense Authorization Act of 1987 (10 U.S.C. 2409);

(B) section 23 of the Toxic Substances Control Act (15 U.S.C. 2622);

(C) section 211 of the Asbestos Hazard Emergency Response Act of 1986 (15 U.S.C. 2651);

(D) section 11(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 660(c));

(E) section 505(a) of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1855(a));

(F) section 105(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 815(c));

(G) section 703 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1293);

(H) section 507 of the Federal Water Pollution Control Act (33 U.S.C. 1367);

(I) section 1450 of the Public Health Service Act (42 U.S.C. 300j–9);

(J) section 210 of the Energy Reorganization Act of 1974 (42 U.S.C. 5851);

(K) section 7001 of the Solid Waste Disposal Act (42 U.S.C. 6971);

(L) section 322 of the Clean Air Act (42 U.S.C. 7622);

(M) section 110 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9610);

(N) section 212 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 441);

(O) section 7 of the International Safe Container Act (46 U.S.C. 1506); or

(P) section 405 of the Surface Transportation Assistance Act of 1982 (49 U.S.C. App. 2305).

(5) FEDERAL AGENCY.—The term "Federal agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, or any interstate governmental agency or commission. For purposes of section 4, the term includes each authority of the Government of a State or a political subdivision of a State that administers or enforces a Federal health or safety law.

(6) FEDERAL HEALTH OR SAFETY LAW.—The term "Federal health or safety law" means any Federal law, or any portion thereof, including any Federal regulation, rule, or order implementing such law or portion thereof, a primary purpose or effect of which is to protect health or safety. The term includes a State law, regulation, rule, or order, enacted as part of a State plan established to carry out a Federal health or safety law.

(7) INVESTIGATION OFFICE.—The term "investigation office" means the office or unit created or designated within the Department of Labor pursuant to section 5(c)(1).

(8) Person.—The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

(9) Proceeding.—The term "proceeding" means a trial, hearing, investigation, inquiry, inspection, administrative rulemaking, or adjudication involving a Federal agency.

(10) Respondent.—The term "respondent" means a person named in a complaint as a respondent.

(11) Secretary.—The term "Secretary" means the Secretary of Labor.

(12) State.—The term "State" means a State of the United States, the District of Columbia, Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, or any other Territory or possession of the United States.

SEC. 4. EMPLOYEE PROTECTION.

(a) In General.—No person shall discharge or in any other manner discriminate against any employee because the employee—

(1) discloses, or demonstrates an intent to disclose, an activity, policy, or practice that the employee

believes evidences a violation of a Federal health or safety law;

(2) initiates, assists, participates, or demonstrates an intent to initiate, assist, or participate, in a proceeding with respect to—

(A) an activity, policy, or practice that the employee believes evidences a violation of a Federal health or safety law;

(B) enactment, adoption, promulgation, issuance, or amendment of a Federal health or safety law; or

(C) administration or enforcement of a Federal health or safety law or of this Act; or

(3) refuses to participate in an activity, policy, or practice when—

(A) such participation constitutes a violation of a Federal health or safety law; or

(B)(i) the employee has a reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation;

(ii) the activity, policy, or practice causing the employee's apprehension of such injury is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or safety, resulting from participation in the activity, policy, or practice; and

(iii) before refusing to participate, the employee, where possible, sought, and was unable to obtain, a correction of the dangerous activity, policy, or practice.

(b) WAIVER.—Except as provided in section 5(l) or pursuant to any court supervised settlement agreement, an agreement by an employee, express or implied, written or oral, purporting to waive or modify the rights of the employee under this Act shall be void as contrary to public policy.

(c) EXEMPTION.—This Act shall not apply under circumstances where an employee acted without direction from the employee's employer, deliberately causing a violation of a Federal health or safety law.

SEC. 5. REMEDY.

(a) STATUTE OF LIMITATIONS.—The statute of limitations for filing a complaint pursuant to this Act or an existing Federal whistleblower protection law shall be 180 days after the later of the date—

(1) an alleged violation occurs;

(2) the discharge or other discrimination has taken effect; or

(3) the employee first learns or reasonably should have learned of the violation.

(b) COMPLAINT.—

(1) FILING.—Any employee who believes the employee has been discharged or otherwise discriminated against by any person in violation of section 4 may, within the period prescribed in subsection (a), file (or have filed by any person on the employee's behalf) a complaint with the Secretary alleging such violation. Except as provided in section 4(a)(3)(B)(iii), the complaint may be filed without regard to exhaustion of any other remedies.

(2) COPY.—On receipt of a complaint, the Secretary shall cause a copy of the complaint to be served on the respondent and on any Federal agency that may have jurisdiction over the activity, policy, or practice alleged in the complaint.

(c) INVESTIGATION.—

(1) ADMINISTRATIVE PROVISIONS.—The Secretary shall create or designate an identifiable office or unit within the Department of Labor that shall be responsible for investigation of complaints filed under subsection (b). The Secretary shall refer all such complaints immediately to the investigation office.

(2) IN GENERAL.—Within 60 days of the receipt of a complaint filed under subsection (b), the investigation office shall conduct an investigation, determine whether there is reasonable cause to believe the complaint has merit, and make findings of fact. If there is reasonable cause to believe a violation of this Act has occurred, the investigation office shall accompany the findings of fact with a preliminary order providing the relief prescribed by subsection (i), including immediate reinstatement of the employee pending a final order on the complaint.

(3) HEARING.—The findings and any preliminary order issued by the investigation office shall be served on all parties to the investigation and shall include a statement of the right of any party to request a hearing pursuant to subsection (d). Where a hearing is not timely requested, the findings and any preliminary order issued by the investigation office shall be deemed the final order of the Secretary and shall not be subject to judicial review.

(4) HEARING PROCEDURE.—In all hearings conducted under this Act, once the complainant has established by a preponderance of the evidence that an activity protected by this Act was a factor in the alleged discharge or discrimination, the burden of proof shall

be on the respondent to prove by clear and convincing evidence that the alleged discharge or discrimination would have occurred even if the employee had not engaged in activities protected by this Act.

(d) HEARING REQUEST.—

(1) TIMING.—The complainant or the respondent may request a hearing before an administrative law judge—

(A) within 30 days of receipt of the findings or preliminary order of the investigation office; or

(B) if no findings have been issued on or before the 60th day of receipt of the complaint, within 30 days thereafter.

(2) JURISDICTION.—The jurisdiction of the investigation office to make findings or issue a preliminary order shall cease on the filing of a request by the complainant for a hearing or the expiration of the period for filing such a request, whichever occurs first. Once the investigation office has lost jurisdiction to make findings or issue a preliminary order, any investigative material compiled by the investigating office in connection with the investigation shall be made available to the complainant or the respondent on request, subject to section 552a of title 5, United States Code.

(3) FILING WITH DEPARTMENT.—Any request for a hearing shall be filed with the investigation office. The investigation office shall file the request with the Office of Administrative Law Judges in the Department of Labor within 5 days of receipt.

(4) NO STAY OF REINSTATEMENT.—Such a request shall not operate to stay any reinstatement remedy contained in a preliminary order issued by the investigation office.

(5) NO FINDINGS.—If the investigation office has failed to make findings within the time period prescribed, the complainant may include in the hearing request a request to the administrative law judge for a preliminary order for immediate reinstatement.

(e) INTERVENTION.—

(1) VIOLATION DETERMINED BY INVESTIGATION OFFICE.—If the investigation office has determined there has been a violation of section 4, the investigation office shall intervene on behalf of the complainant in the proceedings authorized under this section.

(2) VIOLATION NOT DETERMINED.—In all other cases, within 15 days after receipt of a request for a hearing, the investigation office shall make a determination in writing whether, in its discretion, to intervene on behalf of the complainant.

(3) REPRESENTATION.—Such determination or the intervention by the investigation office shall not preclude the complainant or any other person on behalf of the complainant from representing the complainant in the proceedings authorized under this section.

(f) SUBPOENA AND RULEMAKING.—

(1) SUBPOENA POWER.—For purposes of any hearing or investigation provided for in this Act, or any hearing or investigation conducted pursuant to an existing Federal whistleblower protection law where the Secretary has authority to conduct investigations or hearings, the provisions of sections 9 and 10 (relating to attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act (15 U.S.C. 49 and 50) shall be applicable to the jurisdiction, powers, and duties of the Secretary.

(2) RULEMAKING AUTHORITY.—The Secretary shall promulgate such rules and regulations as may be appropriate to administer this Act.

(g) HEARING PROCEDURE.—

(1) TIME FOR COMPLETION.—Any hearing requested pursuant to subsection (d) shall be conducted by an administrative law judge and completed within

180 days of receipt of the request for a hearing by the Office of Administrative Law Judges.

(2) NOTICE.—The parties shall have a reasonable opportunity for prehearing discovery and shall be given written notice of the time and place of the hearing at least 15 days prior to the hearing.

(3) ADMINISTRATIVE PROCEDURE.—The hearing shall be subject to the requirements of section 554 of title 5, United States Code.

(4) TRIAL DE NOVO.—The hearing shall be de novo, except that any preliminary order directing immediate reinstatement shall be enforceable.

(5) DECISION.—Within 60 days after the conclusion of the hearing on the record, or within 240 days after receipt of the hearing request by the investigation office, whichever is sooner, the administrative law judge shall issue a decision containing findings of fact, conclusions of law, and the remedy ordered, if any. The decision shall be served on the Secretary and on all parties to the hearing and shall include a statement to the parties of their right to appeal.

(h) ADMINISTRATIVE APPEAL.—

(1) REVIEW.—Any decision issued pursuant to subsection (g) shall be the final order of the Secretary subject to judicial review pursuant to subsection (k)

unless a party petitions the Secretary for review or the Secretary issues an order of review within 30 days after the issuance of the decision.

(2) TIME FOR REVIEW.—Within 60 days after receipt of the petition for review or issuance of an order of review, the Secretary shall issue a final order, based on the record and the decision of the administrative law judge, which shall be served on all parties. If the Secretary does not issue a final order within the period prescribed by this subsection, the decision of the administrative law judge shall become the final order of the Secretary.

(i) REMEDIES.—

(1) IN GENERAL.—If, in response to a complaint filed under subsection (b), the Secretary, investigation office, or administrative law judge determines that a violation of this Act occurred, the Secretary, investigation office, or administrative law judge shall order—

(A) the person who committed the violation to take affirmative action to abate the violation;

(B) such person to reinstate the complainant to the complainant's former position, if reinstatement is sought, together with compensation, including back pay and lost benefits, terms, conditions, and privileges of the complainant's employment;

(C) compensatory damages; and

(D) such equitable relief as is necessary to correct any violation of this Act or to make the complainant whole.

(2) Costs.—On the issuance or designation of a final order of the Secretary sustaining the complainant's complaint, the Secretary, at the request of the complainant, may assess against the respondent a sum equal to aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary, by the complainant for or in connection with, the bringing of the complaint on which the order was issued.

(j) Private Right of Action.—

(1) In general.—If no decision by an administrative law judge is issued within the period prescribed by subsection (g), the complainant may file a civil action against the respondent within 60 days for damages and declaratory and equitable relief in any district court of the United States having jurisdiction over the parties, without regard to the amount in controversy, the citizenship of the parties. or further exhaustion of any administrative remedies provided in this Act,

except that the court shall not take jurisdiction if the decision of the administrative law judge is issued before the filing of any civil action. The complainant may not file a civil action against the respondent under this subsection once the filing period has expired.

(2) LOSS OF JURISDICTION.—The jurisdiction of the Administrative Law Judge and the Secretary shall cease upon the filing of such civil action. The filing of such civil action shall not operate to stay any preliminary orders, including any orders for immediate reinstatement, issued by the investigation office or by the administrative law judge, unless otherwise ordered by the court.

(3) NOTICE.—On expiration of the period prescribed by subsection (g), the Secretary shall notify the complainant of the opportunity to file a civil action pursuant to this subsection.

(4) COSTS.—On the issuance or designation of a final order of the court sustaining the complainant's complaint, the court, at the request of the complainant, may assess against the respondent a sum equal to aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the court, by the complainant for or in connection with,

the bringing of the complaint on which the order was issued.

(5) EVIDENTIARY RECORD.—If the complainant files a civil action within the period prescribed in this subsection, either party to that action may request that the Administrative Law Judge provide the complete evidentiary record compiled during the administrative hearing to the district court. Provision of the evidentiary record shall not preclude either party from supplementing the record before the district court.

(k) JUDICIAL REVIEW.—Any person adversely affected or aggrieved by a final order issued pursuant to subsection (h) may obtain review of the order in the United States court of appeals for the circuit in which the violation allegedly occurred. The petition for review must be filed within 60 days after the issuance or designation of the final order. The review shall be conducted in accordance with chapter 7 of title 5, United States Code. The filing of a petition for review under this subsection shall not, unless ordered in accordance with the Federal Rules of Appellate Procedure, operate as a stay of the order. A final order of the Secretary with respect to which review could have been obtained under this paragraph shall not be subject to judicial review in any criminal or other civil proceeding.

(l) SETTLEMENT OR ALTERNATIVE DISPUTE RESOLUTION.—

(1) SETTLEMENT.—On receipt of a complaint pursuant to subsection (b), the investigation office shall attempt to reach a settlement between the complainant and the respondent. The Secretary, investigation office, or administrative law judge shall not enter into a settlement terminating a proceeding without the participation and written consent of the complainant. Any settlement order issued pursuant to this subsection shall be a final order of the Secretary and shall include findings that the settlement is fair, adequate, reasonable, and in the public interest.

(2) ALTERNATIVE DISPUTE RESOLUTION.—While the complaint is pending within the Department of Labor, the Secretary may use alternative means of dispute resolution to resolve the complaint, but the parties must consent, in writing, before the Secretary may employ such means.

(m) TIME COMPUTATIONS.—Except as otherwise provided in this Act, for purposes of a proceeding on a complaint, all time computations shall be made in accordance with the Federal Rules of Civil Procedure.

(n) POSTING.—Each employer subject to this Act shall post and keep posted in conspicuous places on its premises a notice to be prepared or approved by the Secretary setting forth such information as the Secretary considers appropriate to effectuate the purposes of this Act.

SEC. 6. ENFORCEMENT.

(a) BY THE SECRETARY.—Whenever a person has failed to comply with an order issued under this Act, the Secretary may file a civil action in the United States district court for the district in which the violation is alleged to have occurred to enforce such order. In an action brought under this subsection, the district court shall have jurisdiction to grant all appropriate relief, including injunctive and declaratory relief and compensatory and exemplary damages.

(b) BY THE PARTIES.—Any person on whose behalf an order is issued pursuant to this Act may commence a civil action against the person named in the order to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order. On issuance of an order on behalf of any person seeking enforcement under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the person seeking enforcement.

SEC. 7. COMPLAINT REFERRAL.

(a) REFERRAL.—On issuance of a final order (including an order approving a settlement pursuant to section 5(l)) by the Secretary, investigation office, or administrative law judge, the Secretary shall cause a copy of such order, but only the relevant portions of a settlement order, to be served on each Federal agency that may have jurisdiction over the activity, policy, or practice alleged in the complaint. Any such Federal agency shall take appropriate action with respect to the activity, policy, or practice. Within 30 days after taking such action any Federal agency shall inform the parties to the complaint filed under section 5(b) of any action taken and shall inform the relevant committees of Congress. If appropriate, the Federal agency shall inform the parties and Congress in the form of a report.

(b) OTHER INVESTIGATIVE AUTHORITY.—Subject to section 8, nothing in this section shall limit the authority of any Federal agency under any other law.

SEC. 8. EFFECT ON OTHER RIGHTS AND REMEDIES.

(a) FEDERAL RIGHTS AND REMEDIES.—It is the express intent of Congress to supersede an existing Federal whistleblower protection law only insofar as such law—

(1) may provide a statute of limitations for filing complaints that is less than 180 days; and

(2) does not authorize subpoena power for the Secretary as provided in section 5(f).

(b) STATE RIGHTS AND REMEDIES.—The rights and remedies provided to employees by this Act are in addition to, and not in lieu of, any other rights and remedies of the employees provided under State law, and are not intended to alter or effect such rights and remedies.

(c) CONTRACTUAL RIGHTS AND REMEDIES.—The rights and remedies provided to employees by this Act are in addition to, and not in lieu of, any other contractual rights and remedies of the employees, and are not intended to alter or effect such rights and remedies.

SEC. 9. EFFECTIVE DATE.

(a) EFFECTIVE DATE.—This Act shall become effective on the date of enactment.

(b) PENDING CASES.—This Act shall apply only to those complaints filed on or after the effective date of this Act.

February 1989

Summary of Employee Health and Safety Whistleblower Protection Act

---

Employees who "blow the whistle" on employers by reporting unlawful or hazardous activities need protection. These courageous individuals should be honored as heroes for protecting the public health and safety. Instead, too often they are discharged, demoted, harassed or intimidated for telling the truth. Worse, many workers are afraid to report unlawful activities because of the threat of personal reprisal.

The current federal statutory scheme to protect employee whistleblowers is a patchwork collection of over a dozen laws. Millions of workers, in such critical industries as aviation, food processing, drug and medical device manufacturing, and pesticide application, have no protection under these laws. Those workers who are protected face unrealistic time limits for filing complaints and the administrative agencies lack the authority to investigate complaints most effectively.

The Employee Health and Safety Whistleblower Protection Act would improve the current federal protection system by (1) closing existing gaps in coverage so that employees in all industries are protected; (2) creating a uniform 180-day statute of limitations so employees can have adequate time to file a complaint; (3) granting subpoena power to the Secretary of Labor to ensure effective investigation of complaints; and (4) ensuring that the underlying health or safety complaints are referred to the appropriate federal agency for further investigation.

Closing Gaps

The current federal protection system has enormous gaps in coverage that make no sense. For example, truckers are protected from reprisal if they report truck safety or health hazards, but airline personnel--pilots, flight attendants or mechanics--have no protection whatsoever. Food processors may be protected if they report hazards that affect their own personal safety, but they are unprotected if they tell government inspectors about tainted or diseased food that endangers consumers.

This bill eliminates the gaps in coverage. The bill generally does not affect those employees already covered by current law. Instead, the bill protects only those employees whose actions are not otherwise protected by existing federal whistleblower statutes. For that limited class of employees, the Act prohibits discrimination against an employee who (1) discloses an activity the employee reasonably believes violates a federal health and safety law; (2) assists or participates in a federal proceeding relating to a federal health and safety law; or (3) refuses to participate in an activity when such participation violates a federal health and safety law or where the employee has reasonable apprehension of serious injury to the employee or the public due to the participation.

The bill creates an administrative procedure in the Department of Labor. All complaints would be investigated initially by the Department. After the investigation, any party could request a full hearing on the record before an administrative law judge within the Department. The bill clarifies each party's burden of proof for an evidentiary hearing. The Secretary of Labor could review a decision by the hearing officer and any party could appeal the Secretary's decision to the court of appeals.

Quick resolution of a whistleblower's complaint furthers everyone's interests. Therefore, the bill includes specific, realistic time limits at each stage of the procedure to insure expeditious consideration of the complaint. If the Department of Labor fails to issue a final decision within the prescribed time period, the employee may then, and only then, bring a civil action seeking protection. The bill provides for standard "make whole" remedies. In addition, copies of complaints and final decisions are forwarded to the appropriate federal agency for further investigation of the substantive health or safety violations uncovered by the whistleblower.

Strengthening Procedures

In addition to closing gaps in coverage, the Employee Health and Safety Whistleblower Protection Act strengthens several key procedures for existing whistleblower protection statutes. The bill addresses two procedural issues--statute of limitations and subpoena power.

Statute of Limitations. Under the current federal system, the statute of limitations--the time one has to file a complaint--ranges from 30 to 180 days. There is no apparent reason for these different statutes of limitations. The resulting confusion in filing deadlines has diminished the effectiveness of the federal protection system. The bill provides a uniform 180-day statute of limitations to provide adequate time to file a complaint and to eliminate unnecessary confusion.

Subpoena Power. The Secretary of Labor enforces the majority of existing whistleblower protection statutes. In many cases, however, the Secretary lacks subpoena power to investigate whistleblower complaints fully. The bill remedies that problem by conferring such power on the Secretary for investigative purposes.

In sum, the Employee Health and Safety Whistleblower Protection Act is designed to eliminate glaring gaps in current federal whistleblower laws and strengthen key enforcement procedures. For further information about the Act, please contact Al Cacozza, Counsel to the Labor Subcommittee at (202) 224-5546 or Melissa Patack, Minority Counsel to the Courts Subcommittee at (202) 224-6736.

Section by Section Analysis of S.436, The Employee Health and Safety Whistleblower Protection Act

Short Title

Section 1 establishes the short title of the Act as the "Employee Health and Safety Whistleblower Protection Act."

Findings

Section 2(a) lists the findings: (1) employees who report unlawful or hazardous activities are performing an important public service; (2) employees should be able to report such activities without fear of reprisal; and (3) current federal laws designed to protect employee health and safety whistleblowers are inadequate.

Purpose

Section 2(b) states the purposes of the Act: (1) to extend protection to employee health and safety whistleblowers who currently have no federal statutory remedy; (2) to create a uniform 180-day statute of limitations for filing whistleblower complaints; (3) to provide the Secretary of Labor with subpoena power to investigate complaints; (4) to provide a limited private right of action for health and safety whistleblowers without current federal statutory remedy; and (5) to ensure that substantive health and safety complaints are referred to the appropriate federal agency.

Definitions

Section 3(2) defines the term "employee" as any individual employed by an employer, including a former employee, who has been retaliated against for reporting a health or safety violation and who currently has no remedy under an existing federal whistleblower protection law.

Section 3(3) defines the term "employer" as a person engaged in a business affecting commerce who has employees. The term "employer" includes a government corporation, the U.S. Postal Service, a State or subdivision of a State, or an interstate governmental agency, but does not include the United States. Agents or employers of an employer are considered "employers."

Section 3(4) defines "existing federal whistleblower protection law" by listing those sections of 16 federal statutes that protect employees from retaliation for reporting unlawful or hazardous activities.

Section 3(6) defines the term "federal health or safety law" as any federal law, regulation, rule, or order, a primary purpose or effect of which is to protect health or safety. The term includes any State law, regulation, rule or order enacted as part of a State plan to carry out a federal health and safety law.

Section 3 also provides standard statutory definitions for the following terms; "commerce," "federal agency," "investigation office," "person," "proceeding," "respondent," "Secretary," and "State."

Protected Activity

Section 4(a) prohibits retaliation against an employee because that employee (1) discloses an activity that the employee believes evidences a violation of a federal health or safety law; (2) initiates, assists, or participates in a proceeding before a federal agency regarding an activity that the employee believes evidences a violation of a federal health or safety law or which relates to enactment, administration, or enforcement of such a law; or (3) refuses to participate in an activity when such participation constitutes a violation of a federal health or safety law or when the employee has reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation and the employee has sought and been unable to obtain a correction of the dangerous activity.

Waiver

Section 4(b) establishes that an employee cannot waive the rights provided under this Act, except through a settlement agreement.

Exemption

Section 4(c) provides that the protection afforded by the Act does not apply to an employee who deliberately causes a violation of a federal health or safety law.

Statute of Limitations

Section 5(a) creates a uniform 180-day statute of limitations for filing a complaint pursuant to this Act or an existing federal whistleblower protection law.

Complaint Procedure

Section 5(b) allows any employee to file a complaint with the Secretary to redress a violation of the Act. The Secretary shall serve the complaint on the respondent and refer the underlying safety or health allegations to the appropriate federal agency.

Investigation

Section 5(c)(1) requires the Secretary to create or designate an investigation office to investigate complaints. The Secretary must refer all complaints immediately to that office.

Section 5(c)(2) requires that the investigation office, within 60 days of receipt of the complaint, conduct an investigation, determine whether there is reasonable cause to believe the complaint has merit, and make findings of fact. If the investigation office finds reasonable cause to believe a violation of the Act has occurred, it shall issue a preliminary order providing for relief, including immediate, temporary reinstatement.

Section 5(c)(3) requires the investigation office to serve the findings on all parties, and to inform the parties of the right to request a hearing before an administrative law judge (ALJ). If no hearing is requested, the findings issued by the investigation office are final and not subject to judicial review.

Burden of Proof

Section 5(c)(4) establishes the burden of proof for all hearings conducted under the Act. The complainant must prove, by a preponderance of the evidence, the protected activity was a factor in the employment action. If the complainant meets that burden, the respondent must prove by clear and convincing evidence that the employment action would have occurred regardless of the complainant's participation in protected activity.

Hearing Request

Section 5(d)(1) states the time for filing a hearing request: (1) within 30 days of receipt of the findings of the investigation office; or (2) if the investigation office has issued no findings on or before the 60th day of receipt of the complaint, within 30 days thereafter.

Section 5(d)(2) provides that the investigation office loses jurisdiction upon the filing of a hearing request by the complainant or when the filing period for a hearing request expires, whichever occurs first. Once the investigation office loses jurisdiction, either party may obtain any investigative material compiled by that office, subject to the limits of the Privacy Act.

Section 5(d)(3) directs the parties to file hearing requests with the investigation office, which will file such requests with the Office of Administrative Law Judges within 5 days.

Section 5(d)(4) establishes that a hearing request shall not stay any reinstatement remedy contained in a preliminary order.

Section 5(d)(5) states that if the investigation office has failed to make findings within the time period prescribed, the complainant may seek a preliminary order for immediate, temporary reinstatement from the ALJ.

Intervention

Section 5(e) directs the investigation office to intervene on behalf of the complainant if the office finds the complainant has been retaliated against for engaging in protected activity. In all other cases, the investigation office shall make a written determination whether to intervene for the complainant, within 15 days after receipt of a hearing request. Intervention by the investigation office shall not preclude the complainant from obtaining separate representation.

Subpoena and Rulemaking

Section 5(f) provides the Secretary with subpoena power identical to the power currently provided by the Federal Trade Commission Act for any hearing or investigation under this Act or any existing federal whistleblower protection law. The section also directs the Secretary to promulgate rules necessary to administer this Act.

Hearing Procedure

Section 5(g)(1) directs the ALJ to complete the hearing within 180 days of receipt of a hearing request. Section 5(g)(2) allows all parties to have a reasonable opportunity for discovery and to be given written notice of the hearing at least 15 days in advance.

Sections 5(g)(3-4) provide that the Administrative Procedure Act rules for adjudications should apply to the hearing and that all hearings shall be de novo, except that any preliminary order for immediate temporary reinstatement shall be enforceable.

Section 5(g)(5) directs that within 60 days after conclusion of the hearing, or within 240 days after the investigation office receives a hearing request, whichever is sooner, the ALJ shall issue a decision containing findings of fact, conclusions of law, and the remedy ordered. The ALJ shall serve the decision on the Secretary and all parties, along with a statement concerning the right to appeal.

Administrative Appeal

Section 5(h)(1) deems the ALJ's decision as the final order of the Secretary, subject to judicial review, unless a party petitions the Secretary for review or the Secretary orders review within 30 days after the issuance of a decision.

Section (5)(h)(2) states that the Secretary shall issue a final order within 60 days after receipt of a petition for review. If the Secretary fails to act within the 60-day period, the decision of the ALJ becomes the final order of the Secretary.

Remedies

Section 5(i)(1) provides for the following remedies: (1) affirmative action to abate the violation; (2) reinstatement of the complainant to the complainant's former position, together with compensation, including back pay and lost benefits; (3) compensatory damages; and (4) equitable relief as necessary to correct any violation or make the complainant whole.

Section 5(i)(2) allows the Secretary to assess against the respondent all costs and expenses reasonably incurred by a successful complainant including attorney's fees.

Private Right of Action

Section 5(j)(1) creates a private right of action for the complainant against the respondent if the ALJ fails to issue a decision within 60 days after completion of the hearing or within 240 days after the investigation office receives a hearing request, whichever is sooner. In that limited circumstance, the complainant may file a civil action within 60 days in any United States district court with jurisdiction over the parties. The court shall not take jurisdiction if the ALJ issues a decision before the filing of the civil action. The complainant is barred from filing a civil action once the filing period has expired.

Section 5(j)(2) provides that the ALJ and the Secretary lose jurisdiction once the complainant files a civil action. The filing, however, does not stay a preliminary order unless ordered by the court.

Section 5(j)(3) specifies that the Secretary shall notify the complainant of the opportunity to file a civil action when that opportunity becomes available.

Section 5(j)(4) allows the court to assess against the respondent all costs and expenses reasonably incurred by a successful complainant, including attorney's fees.

Section 5(j)(5) provides that either party may request that the ALJ transmit the complete evidentiary record compiled during the administrative hearing to the court. This request does not preclude supplementing the court record.

Judicial Review

Section 5(k) provides that any person adversely affected by the Secretary's final order may obtain judicial review in the United States court of appeals. The petition for review must be filed within 60 days after the issuance of the final order. The court will apply the judicial review provisions of the Administrative Procedure Act. The petition does not stay any order of the Secretary unless otherwise ordered by the court. If the parties do not seek judicial review, a final order shall not be reviewable in any other proceeding.

Settlement or Alternative Dispute Resolution

Section 5(l)(1) establishes that the investigation office shall attempt to reach a settlement between the parties. There cannot be a settlement without the written consent of the complainant, and without a finding by the Secretary that the settlement is fair, adequate, reasonable, and in the public interest.

Section 5(l)(2) states that the Secretary may use alternative means of dispute resolution to resolve the complaint, so long as all parties consent in writing.

Time Computations

Section 5(m) provides that time computations, not otherwise provided for in this Act, shall be made in accordance with the Federal Rules of Civil Procedure.

Posting

Section 5(n) requires each employer to post a notice containing information the Secretary deems appropriate to effectuate the Act.

Enforcement

Section 6 states that if a person fails to comply with an order issued under this Act, the Secretary, or any person on whose behalf an order is issued, may file a civil action in the United States district court to enforce such an order.

Complaint Referral

Section 7 requires the Secretary to serve each final order on any federal agency that may have jurisdiction over the underlying health or safety allegations in the complaint. Such agency shall take appropriate action regarding the allegations. Within 30 days after taking such action, the agency shall inform the involved parties and the relevant committees of Congress as to any action taken.

Effect on Other Rights and Remedies

Section 8 establishes that Congress intends this Act to supersede existing federal whistleblower protection laws only insofar as such laws: (1) may provide a statute of limitations for filing complaints that is less than 180 days; and (2) do not authorize subpoena power for the Secretary. The rights and remedies provided to employees by this Act are in addition to, not in lieu of, any other rights and remedies as provided by State law or by contract.

Effective Date

Section 9 provides that this Act shall become effective on the date of enactment, but that it will apply only to those complaints filed on or after the effective date.

Senator **Metzenbaum**. Senator Harkin, I am very happy to have you here with us this morning. I will be pleased to hear your opening statement.

OPENING STATEMENT OF SENATOR HARKIN

Senator **Harkin**. Mr. Chairman, thank you.

I would ask that my written statement be made a part of the record, and I would like to once again compliment you and my colleague from Iowa, Senator Grassley, for getting this bill together and getting it introduced in a timely fashion. I am proud to be an original cosponsor of it.

Of course, this is necessary because of, as you point out, the gaps that exist in coverage today where, for example, truck drivers may have the kind of protection we envision here, but airline pilots do not. So these gaps have to be closed.

I would also point out, Mr. Chairman, that last year we passed a whistleblower bill that came out of another committee that pertains to Federal workers. That was passed unanimously by the Senate, if I am not mistaken—I do not believe there was one vote against it——

Senator **Metzenbaum**. There was not one vote against it, but I must confess to you that we had to make a major concession in order to get it passed, and that had to do with awards being given. We have another bill this year, Senator Grassley and I, putting back in place those awards. But there were no votes against it, and it was a major piece of legislation, and we are very proud of it.

Senator **Harkin**. And it passed the House, I believe, almost unanimously—there may have been a couple of votes against it. That was the bill, of course, that President Reagan pocket-vetoed after the Congress adjourned.

Senator **Metzenbaum**. That is correct.

Senator **Harkin**. I am hopeful that we will bring that bill up again this year and get it through. So mating these two bills and getting them through, I think, would be a major accomplishment of this Congress.

Senator **Metzenbaum**. Thank you.

We are very grateful to have you working with us. I am very pleased that you are one of our cosponsors.

I might say publicly, we have ten cosponsors, and we feel very pleased about that.

Before we begin today's hearing, I want to note the absence of witnesses from the business community. At the hearing on last year's bill, the business community also failed to come forward, despite the good faith efforts of this subcommittee, including my then ranking member, Senator Quayle, to solicit business testimony.

This year, we redoubled our efforts to secure business testimony. I worked closely with Senator Grassley to craft this bill. During that process we actively solicited input from representatives of the business community. Unfortunately, there was very little constructive input offered.

We have also worked closely with the new ranking minority member of this subcommittee, Senator Jeffords, in scheduling this hearing and arranging for witnesses. Senator Jeffords took the lead in recruiting business witnesses. He made a diligent and good faith effort to invite a number of business community representatives, and we do appreciate his efforts.

Frankly, it bothers me that the business community has not seen fit to offer us their input. The community has declined our invitations. The record will remain open for ten days after the hearing to allow the business community or other interested parties to submit written statements.

I encourage all interested parties, including business representatives, to take advantage of this opportunity. This is the second time the business community has chosen not to testify on this whistleblower legislation. This reluctance disappoints me because I was looking forward to a constructive dialog and to working cooperatively with them to fashion this bill so that it would not be a burden on the business community.

Silence, truthfully, is not golden. I am gratified that the business community is comfortable, apparently, with this bill, but I am concerned that we will hear from them at a later point, indicating their opposition. That, in my opinion, is not the way legislation should be drafted. I think it should be drafted in a cooperative effort, and I want to say to the business community as loudly and as publicly as I can: We welcome your cooperation, we welcome your input. We are willing to compromise if there is some unnecessary burden that we are placing on the business community in this legislation. And if we do not hear from you, we will just have to assume that you look favorably upon this bill.

Senator **Metzenbaum**. Our first witness today is the cosponsor of the bill, Senator Charles Grassley. Senator Grassley, as we all know, has made a tremendous name for himself throughout the country, being in the forefront of this entire issue having to do with whistleblowers.

Senator Grassley, we are happy to have you here this morning.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator **Grassley**. Thank you, Mr. Chairman and Senator Harkin.

It is a privilege to not only be here because I am a cosponsor of the bill, but it is nice to be able to be here at your invitation as well to discuss these things that are of mutual concern to us and that I think will be of mutual concern not only with us, but also with the business community as well. I intend to pursue further dialog with the business community, and I also believe that we can have them involved in the legislation. And more importantly, I think that at this point it is probably because, as we all know, the business community does not think monolithically, and it is probably some division within their own community as to how they ought to respond to this legislation that makes it difficult to come forth, but we will try to encourage that sort of dialog.

Mr. Chairman, as you know, and as you have already stated, during my service in the Senate I have championed the rights of whistleblowers who disclose waste and fraud in the Federal Government. My work has led me to conclude that whistleblowers perform a valuable public service. Without their disclosures, we would not begin to know where to find waste and inefficiency.

Whistleblowers face enormous obstacles to their efforts to expose waste and to correct that wrongdoing. Our system rewards these employees with the most unfair prizes—like discharge, demotion, and unwanted transfers. They risk their careers as well as their reputations in the interest of honest Government, and they do so reluctantly.

One study showed that 70 percent of employees who see wrongdoing refuse to disclose it. Not only do they fear retaliation, but they keep quiet, because they believe that nothing will be done to correct the waste and fraud.

So we must not only protect the jobs of the whistleblowers, but we also must make sure the situations that they identify get corrected if we are going to encourage further whistleblowing activity.

So Mr. Chairman, employees who disclose violations of federally mandated health and safety standards also perform a valuable public service. They equally deserve our encouragement and protection.

Now, as you have stated, we already have 14 statutes regulating workplace health and safety, and which attempt to protect whistleblowers. But a number of other health and safety laws do not contain such protection. This bill will fill in the gaps in whistleblower protection so that employees who disclose health and safety violations have protection.

About 2 years ago, the Administrative Conference of the United States studied health and safety whistleblowers law. The study concluded that current law lacks uniformity and consistency. While not solving all the problems identified by the administrative conference, this bill that you and I are introducing reduces some of those inconsistencies and begins to bring some uniformity to whistleblower protection.

In addition, it addresses both concerns which would-be whistleblowers have—first, the bill ensures that health and safety violations get investigated, and it does that by requiring the Department of Labor to notify the appropriate regulatory agency of the underlying health and safety problem. And second, the bill's antidiscrimination provisions offer employees the job protection that is going to encourage them to come forth, but more importantly, set an environment so that whistleblowing protection and the information that comes from whistleblower activities will be brought out so that we do not have, like we do in the Federal Government, 70 percent of the employees, even if they know of a problem, unwilling to tell about that problem.

I, like you, Mr. Chairman, want to ensure that employees work in a safe environment. The American public deserves no less. However, I have a competing concern—the unconstrained growth in litigation created by so much of our legislation. We cannot expect our courts to solve all of our problems.

Thus I am pleased that this legislation offers whistleblowers enhanced protection without an unnecessary increase in our Federal court docket. This bill requires the employee to first pursue his retaliation claim before the Department of Labor investigator. The next stage provides that the employee and employer proceed to a hearing before an administrative law judge. And only if the ALJ is unable to conclude the case within the specified time frame can the employee proceed to the courts.

While this bill begins to address some of my concerns about the litigious nature of our society, I firmly believe that we must do more to encourage employers and employees to resolve disputes without expending great amounts of time and money. So alternative dispute resolution, I believe, is the procedure that can have this effect.

In the private sector, alternative dispute resolution, like arbitration and mediation—and there are several other approaches—have long been used to great advantage to provide quicker, better and less expensive decisions. In my view the Federal Government has much to learn from these experiences.

Last Congress, Senator DeConcini and I introduced legislation which would encourage and extend the use of alternative dispute resolution by agencies across the Federal landscape. We plan to introduce it again shortly. So, Mr. Chairman, I commend it to you for your personal attention. We would very much like your support on an agency-wide ADR, even as I look forward to working with you on incorporating ADR mechanisms into this bill.

So, Mr. Chairman, in summary, the employees who bring health and safety violations to public light deserve our thanks. At a minimum we need to ensure that their careers are secure. This bill sends an important message to employers, employees, and to the American public at-large: Violations of health and safety standards, like Federal waste and fraud, will not and cannot be tolerated. And we need to rely on courageous employees to help us make sure that Federal standards are met.

I thank you.

Senator **Metzenbaum**. Thank you, Senator Grassley.

We appreciate your testimony and your steadfast support for this legislation, and I appreciate your particular concern with respect to the use of alternative dispute resolution mechanisms. As you know, the bill already contains provisions allowing the Secretary to use such mechanisms, and that was one of the specific recommendations we incorporated from the Administrative Conference.

The employee, the employer and the public are all better off if we can resolve whistleblower complaints quickly, and the bill includes streamlined and efficient procedures to resolve disputes expeditiously. I share your concern and interest in exploring ways to develop alternative dispute resolution mechanisms that will ease the burden of the system and on the parties. But in our efforts at streamlined procedures, we must ensure that the parties are treated fairly.

Just as we have in the past, my staff and I will work with you to address your concerns about the alternative dispute resolution provision that is presently in the bill, and I am certain we will be able to resolve it.

Senator Harkin.

Senator **Harkin**. I do not have any questions. Again, I would just compliment my colleague on working on this bill and putting it together. I am, as I said, glad to be a cosponsor and compliment you on your efforts.

Senator **Grassley**. Well, I am glad to be here, and I stand ready and willing to help on any of these matters, including what we have already spoken to about dialog with the business community.

Thank you.

Senator **Metzenbaum**. Thank you very much, Senator Grassley.

We are going to change just one little detail of our schedule. A man who appears on television these days more than any other featured entertainer or TV newscaster is Capt. Henry Duffy, president of the Air Line Pilots Association. We have Captain Duffy listed in our fourth panel, but I know that he is appearing over in the House in connection with the Eastern matter, so we are going to take you out of order, Captain Duffy.

We appreciate your not cancelling on us and being with us here this morning, and also appreciate your involvement and the able leadership you are giving your organization in the pending matter.

STATEMENT OF CAPT. HENRY DUFFY, PRESIDENT, AIR LINE PILOTS ASSOCIATION, WASHINGTON, DC, ACCOMPANIED BY JIM JOHNSON, LEGAL COUNSEL

Captain **Duffy**. Thank you, Mr. Chairman, Senator Harkin.

We appreciate this opportunity to appear on behalf of the 41,000 pilots that ALPA represents at 43 airlines around the country.

With me today is Mr. Jim Johnson, a member of ALPA's legal staff.

Senator **Metzenbaum**. Captain Duffy, not on this particular issue, but have the pilots or yourself taken any position as to what steps you think should be taken to resolve the labor dispute at Eastern?

Captain **Duffy**. Yes, Mr. Chairman. From the beginning of this dispute, we thought that its national implications were so manifest that we felt that only a Presidential emergency board, as entitled under the Railway Labor Act, could put a global settlement to this problem. We recommended strongly to all of the President's advisors that that take place.

For some reason unknown to us, they have turned down the recommendation of the National Mediation Board, which was to create such a Presidential emergency board. We continue to discuss this with the advisors, but we are continuing to get no for an answer.

In the meantime, there is legislation already introduced in the House, soon, I think, to be introduced in the Senate, to congressionally create a board, again, which we feel is the only way out of a dispute that has truly gotten to bitter proportions that I do not think any of us have seen in our airline industry, since I have been around here the 26 years, anyway.

Senator **Metzenbaum**. Am I correct in my understanding that on 44 previous occasions when the National Mediation Board has recommended the appointment of an emergency board by the President, in all 44 of them the President has appointed such a board?

Captain **Duffy**. That is correct, Mr. Chairman. And that makes it doubly mystifying in a situation like this, where there really are national implications here. I mean, we have had a major portion of the airline lift collapse, and it simply does not exist anymore. Because of that, passengers are being moved over to other carriers; other carriers are trying to put on extra sections and charters, and frankly, the situation out there is a mess.

Senator **METZENBAUM**. Am I also correct in my understanding that out of those 44 cases, 36 of the disputes were amicably resolved thereafter, without a work stoppage?

Captain **DUFFY**. That is also correct, Mr. Chairman.

It was the purpose of putting this procedure into the act, in recognition of the fact that there would be certain circumstances where only a board created under these circumstances could amicably settle the dispute.

Senator **METZENBAUM**. Thank you very much, Captain Duffy.

I might say that my staff points out that you and I have taken the 36 and 44, when the correct numbers are 26 and 34. But the record will stand corrected in that respect.

Senator Harkin.

Senator **HARKIN**. Mr. Chairman, I am sorry, I have to go to an Appropriations Committee hearing. I read Captain Duffy's testimony, and I just wanted to say publicly what I have said privately—and I do not believe in saying things in private that I would not say in public. Again, I wanted to congratulate you and the airline pilots for what you have done and what you are doing.

I agree with you that the President should have reacted, should have set up the board to avert this terrible strike. But I believe the pilots have shown good judgment and restraint and solidarity with the machinists in making sure there is a just resolution of this—not just a resolution on one side or the other.

Captain **DUFFY**. Senator Harkin, that will mean a lot to our members, particularly our Eastern members, who have put their jobs literally on the line in this dispute. I hope it shows to you and to the Congress and to the American people how sincerely they feel about the problems that exist at Eastern Airlines.

Senator **HARKIN**. I want you to know I have a number of friends whom I used to fly with in the Navy who are pilots for commercial carriers, I would say probably half a dozen of whom fly for Eastern. I maintain some contact with them, so I think I have a fairly good feel for what is going on. That leads me to say that I think what you are doing is in the best interest of the entire public.

Captain **DUFFY**. Thank you for that, Senator.

Senator **METZENBAUM**. I might say, Captain Duffy, that had the pilots not opted to follow the procedure that you are presently following, that is, to respect the picket line, I think that many of us in the Senate and the Congress would have truly questioned the integrity of your position, the actuality of whether you are a workers' union or whether you are a management union. For myself, I have a lot of respect for airline pilots who saw fit to respect the picket line of a fellow group of workers in the same industry, and I commend you for it.

Captain **DUFFY**. Thank you, Mr. Chairman. A sympathy strike is a tough situation for all the employees, but again, it shows how strongly our pilots feel about what has been going on over there at Eastern.

Senator **METZENBAUM**. Well, as a matter of fact, if you had not followed that, you would have put yourself not in the position of a sympathy strike; you would have been, as I see it, in the position of asking your members to cross a picket line. This Senator does not cross picket lines and has great reservations about other working people crossing picket lines.

Captain **Duffy**. This airline captain does not, either.

Senator **Metzenbaum**. Please proceed, Captain Duffy.

Captain **Duffy**. Well, Mr. Chairman, I do appreciate the opportunity to appear before the subcommittee to provide you with ALPA's views in support of S. 436, which would protect airline employees from retaliation by their employers for reporting information relating to air safety to the appropriate Government agencies.

Both the public interest and Federal law require that air carriers perform their services with the highest possible degree of safety. However, as I have expressed on previous occasions before Congress and in other forums, we are concerned that today's competitive pressures in the deregulated airline industry and the overriding concern of managements with bottom-line profits have resulted in some airlines reducing the level of safety at which they operate.

The Federal Aviation Administration, as you know, is the primary Government agency responsible for ensuring that air carriers operate safely. I believe that the committee is also painfully aware that the FAA lacks the necessary resources to conduct the ongoing ramp inspections of aircraft and continuous safety compliance inspections of all airlines. For this reason, the FAA must of necessity rely primarily on spot checks and periodic compliance inspections to determine if airlines are in compliance with safety regulations.

Therefore, in day-to-day operations, the only continuous checks and balances for insuring that an airline is complying with the FAA's safety rules are the mechanics and the flight crew members who maintain and operate the aircraft.

Public policy and common sense dictate that these people should not only be encouraged to report violations of Federal safety regulations to the FAA, but should be required to do so when their company refuses to voluntarily correct reported deficiencies.

However, these airline employees, unlike truckers and Federal employees, have no protection from retaliation by their employers for making such reports to Government agencies.

Neither current Federal law nor the Federal courts provide any recourse to the airline employee who makes such reports and is fired for doing so. Thus, employees are faced with a difficult dilemma—a loss of their livelihood if they report the violation, or a potential loss of life if the matter is not reported.

As the subcommittee will learn during this hearing, the dilemma is real and not merely perceived. Some airlines are threatening their employees with discharge or other discipline if they report safety violations to the FAA. Indeed on some occasions, the names of the employees making such reports were revealed to the employer by the FAA.

While ALPA, by virtue of its collective bargaining agreements, has protected the jobs of pilots who have reported safety violations, our fellow pilots who are not organized do not enjoy this protection.

However, even our members have experienced harassment and company intimidation tactics when they have reported flight safety violations or refused to fly unsafe aircraft.

For example, last year we encouraged Eastern Airlines pilots to respond to a request from the FAA Administrator, Donald Engen, for members of the aviation community to report safety-related deficiencies. However, because we feared reprisals from Eastern management against those who spoke out, we asked the pilots not to include their names, dates, flight numbers, or other identifying information.

The lack of specific information made it difficult, if not impossible, for the FAA to track down the reported violations. Had their been statutory protection for those who reported violations, the FAA could have quickly investigated the reported violations and required prompt corrective action.

As the subcommittee may be aware, there have been several instances of intimidation at Eastern Airlines concerning pilots who refused to accept an aircraft for safety reasons and were summarily removed from their flight status without any explanation and left in suspense for several days. The message being sent by the company was clear—pilots who refuse aircraft even for safety reasons do so at the risk of their employment.

Another example of the pressures brought to bear on employees who speak out on flight safety issues occurred last year and involved a pilot who testified before the House Subcommittee on Investigations and Oversight regarding the maintenance deficiencies on her Regional Airline. Her company, distressed about her testimony, reprimanded her for it and later refused to permit her time off to accept an invitation to appear with me before a Presidential Commission established by Congress, which was looking into the entire question of air safety.

Whistleblower legislation such as S. 436 is needed to protect those conscientious employees who report safety violations from retaliation, and ALPA fully supports this legislation, Mr. Chairman.

I commend you and Senator Grassley for introducing it and supporting it.

[The prepared statement of Captain Duffy follows:]

STATEMENT OF
HENRY A. DUFFY, PRESIDENT
AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL
BEFORE THE
SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
U.S. SENATE
MARCH 7, 1989
S. 436
THE EMPLOYEE HEALTH AND SAFETY WHISTLEBLOWER PROTECTION ACT

Mr. Chairman, I am Captain Henry Duffy, President of the Air Line Pilots Association. ALPA represents the professional interests of over 41,000 pilots who fly for 47 airlines. With me today is Mr. James Johnson, a member of ALPA's Legal Department.

I appreciate the opportunity to appear before the Subcommittee to provide you with ALPA's views in support of S. 436, which would protect airline employees from retaliation by their employers for reporting information relating to air safety to the appropriate government agencies.

Both the public interest and federal law require that air carriers perform their services with the highest possible degree of safety. However, as I have expressed on previous occasions before Congress and in other forums, we are concerned that today's competitive pressures in the deregulated airline industry and the overriding concern of managements with bottom line profits have resulted in some airlines reducing the level of safety at which they operate. The Federal Aviation Administration, as you know, is the primary government agency responsible for insuring that air carriers operate safely. I believe that the committee is also painfully aware that the FAA lacks the necessary resources to conduct ongoing ramp inspections of aircraft and continuous safety compliance inspections of airlines. For this reason, the FAA must of necessity rely primarily on spot checks and periodic compliance inspections to determine if airlines are in compliance with safety regulations. Therefore, in day-to-day operations the only continuous checks and balances for insuring that an airline is complying with the FAA's safety rules are the mechanics and the flight crew members who maintain and operate the aircraft.

Public policy and common sense dictate that these people should not only be encouraged to report violations of federal safety regulations to the FAA, but should be required to do so when their company refuses to voluntarily correct reported deficiencies. However, these airline employees, unlike truckers and federal employees, have no protection from retaliation by their employers for making such reports to government agencies. Neither current federal law nor the federal courts provide any recourse to the airline employee who makes such reports and is fired for doing so. Thus, employees are faced with a difficult dilemma, a loss of their livelihood if they report a violation or a potential loss of life if the matter is not reported. As the Subcommittee will learn during this hearing, the dilemma is real and not merely perceived. Some airlines are threatening their employees with discharge or other discipline if they report safety violations to the FAA. Indeed, on some occasions, the names of the employees making such reports were revealed to the employer by the FAA.

While ALPA, by virtue of its collective bargaining agreements, has protected the jobs of pilots who have reported safety violations, our fellow pilots who are not organized do not enjoy this protection. However, even our members have experienced harassment and company intimidation tactics when they have reported flight safety violations or refused to fly unsafe aircraft.

For example, last year we encouraged Eastern Air Lines' pilots to respond to a request from then FAA Administrator Donald Engen for members of the aviation community to report safety-related deficiencies. However, because we feared reprisals from Eastern management against those who spoke out, we asked the pilots not to include their names, dates, flight numbers or other identifying information. The lack of specific information made it difficult, if not impossible, for the FAA to track down the reported violations. Had there been statutory protection for those who reported violations, the FAA could have quickly investigated the reported violations and required prompt corrective action.

As the Subcommittee may be aware, there have been several instances of intimidation at Eastern Air Lines concerning pilots who refused to accept an aircraft for safety reasons and were summarily removed from flight status without any explanation and left in suspense for several days. The message being sent by the company was clear - pilots who refuse aircraft, even for safety reasons, do so at the risk of their employment.

Another example of the pressures brought to bear on employees who speak out on flight safety issues occurred late last year and involved a pilot who testified before the House Subcommittee on Investigations and Oversight regarding the maintenance deficiencies on her Regional Airline. Her company, distressed about her testimony, reprimanded her for it and later refused to permit her time off to accept an invitation to appear with me before a Presidential Commission established by Congress, which was looking into the entire question of air safety.

Whistleblower legislation, such as S. 436 is needed to protect those conscientious employees who report safety violations from retaliation, and ALPA fully supports this legislation. Mr. Chairman, I commend you and Senator Grassley for taking the initiative and ALPA stands ready to work with you to obtain passage of this much needed bill.

This concludes my remarks and we would be pleased to respond to any questions the Subcommittee may have.

Senator **Metzenbaum**. Thank you, Captain Duffy.

Captain, which airline refused to permit that woman pilot to appear before the investigating committee?

Captain **Duffy**. ComAir.

Senator **Metzenbaum**. In your testimony you noted particular problems with fear of reprisal at Eastern Airlines. According to the FAA hotline reports, Eastern has been the subject of many more safety hotline reports than any other air carrier. Eastern accounted for 48 percent of all air carrier reports for maintenance and airworthiness issues in 1987 and 1988.

According to the FAA, Eastern accounted for 43 percent of the violation actions initiated in 1987 and 70 percent of the violation actions initiated in 1988. That is an unbelievable record. I do not believe the American people are aware that Eastern accounted for 43 percent of the violation actions initiated in 1987; 70 percent of those actions in 1988.

Could you describe the intimidation used by Eastern to discourage safety reporting?

Captain **Duffy**. I think those percentages are clearly indicative of a management pattern that refused to recognize safety problems. And the type of experiences that my members encountered were, when turning down an airplane for a legitimate safety reason, they would be questioned by a supervisor; a flight manager would come out to second-guess their decision; in many cases, they were removed from the line and simply told, "Go home. Don't take your trip. The next captain will be confronted with this airplane, and maybe that captain will take it." If they go through that captain, he is sent home, and the next one is confronted, until pretty soon the word gets out that you had better take this airplane.

Senator **Metzenbaum**. But I am the passenger, and I am flying on that plane, even if the captain goes home and thinks that there is some problem as to the air-worthiness of the plane.

Captain **Duffy**. Mr. Chairman, in this industry—again, I came to work in 1962—not second-guessing the captain has been a resolute company policy, pretty standard in the aviation industry. For this to turn around now and have captains' decisions on airplanes second-guessed, with the intimidation that goes with that and the professional stigma of being removed from your airplane for not accepting it when management thinks you should accept it is a very dangerous precedent that we don't want to get started in this industry.

Senator **Metzenbaum**. Is it the fact that some of the people who are doing the second-guessing are not even licensed pilots, are not even qualified to fly the planes, but are actually just the superintendent of the flight—or am I wrong about that?

Captain **Duffy**. Well, any management person who is available is sent out there to try to get the flight under way. The people who actually disciplined our pilots were generally flight managers. But I am just giving you pilot experiences. The mechanics have a whole list of people, including firings. In our case, we were just talking about removals, but on the machinists' side, they have had people fired for refusing to perform shortcut measures to fix airplanes.

Senator **Metzenbaum**. In your opinion, can the FAA adequately protect the public if aviation workers do not cooperate to help enforce safety regulations?

Captain **Duffy**. Not under any current circumstances or any I would foresee in the near future. They work, and always have worked in this industry on a designee system. That means that the authority is passed out there to the employees to perform the work, and in some cases the employees of the company to actually sign off on the maintenance. It is meant to have the employees as watchdogs within the system. And with the current funding problems that we are having, we are never going to have enough money to buy enough inspectors to put them out there and let them have the place of that system, nor do I think we want that to happen. Better that we remove the intimidation and let the employees provide the function that they were put there to serve.

Senator **Metzenbaum**. I know your union has a grievance procedure to protect your members. The Metzenbaum-Grassley bill will not affect that procedure or any procedure negotiated through collective bargaining. But what advice would you give to a non-union pilot who is considering blowing the whistle on a safety violation?

Captain **Duffy**. Well, that is a tough one, because that employee is literally faced with perhaps a life or death decision on one hand and his job on the other, and that is not a position he should be put in. But I would tell that employee to risk the job because air safety is more important than that.

I would also hope that we can put some procedures around him that will insulate him or her from that type of decision.

Senator **Metzenbaum**. Thank you very much, Captain Duffy.

We are very happy to have your general counsel with us, and frankly, I gather that neither Senator Harkin's or my questions required a special legal opinion, but we are happy to have you with us here this morning.

Captain **Duffy**. Thank you, Mr. Chairman.

Senator **Metzenbaum**. Thank you.

I want to welcome Jerry Thorn, Acting Solicitor, U.S. Department of Labor, Washington, DC.

I do want to say to Mr. Thorn that normally our protocol would provide that a representative of the Department of Labor would be the next witness after the Senator. Under the circumstances, I hope you understand it was not a reflection upon our respect for you, and we are happy to have you with us, sir.

STATEMENT OF JERRY G. THORN, ACTING SOLICITOR OF LABOR, U.S. DEPARTMENT OF LABOR, WASHINGTON, DC

Mr. **Thorn**. Mr. Chairman, I understand that Captain Duffy has other places to be.

Let me say first that I am pleased to be here this morning to discuss with the chairman and other members of this committee, at least for the record, the Department of Labor's review of existing statutory whistleblower protections and recommendations that have been developed concerning the uniformity and enhancement of those provisions.

Whistleblower protections are protections for employees against retaliation by their employers for disclosing an illegal practice or hazard. Some protections have developed under common law and under State statute. Some Federal laws have been enacted as well.

The rationale for both the common law and statutory protections is that the public has an important interest in protecting such employee conduct.

While the Department of Labor does not administer all existing Federal safety and health whistleblower protection programs, it does administer many of them. These include relevant provisions of the Occupational Safety and Health Act, the Federal Mine Safety and Health Act, the Surface Transportation Assistance Act, and a number of environmental statutes including the Energy Reorganization Act, the Clean Air Act, the Safe Drinking Water Act, the Solid Waste Disposal Act, and the Toxic Substances Control Act.

I would note that the Department also has enforcement responsibilities in connection with a number of anti-retaliation provisions of statutes that are not related to safety or health. These include the Fair Labor Standards Act, the Employee Retirement Income Security Act, and the Job Training Partnership Act.

In mid-1987, the Administration Conference of the United States issued a report about Federal safety and health whistleblower programs. They found that investigative and adjudicative responsibilities for the existing Federal programs were divided among a number of departments and among agencies within the Department of Labor, with little coordination among them. ACUS found that protected conduct varied, as did statutory procedures. The Conference noted that the lack of uniformity "most likely reflects the incremental enactment of the various statutes over a period of years."

To achieve uniformity, ACUS recommended that the Congress enact omnibus legislation for the handling and resolution of whistleblower complaints with respect to those categories of workers already covered.

ACUS recommended that the Department of Labor be the agency responsible for the enforcement of the statutory protections, and the legislation included a uniform definition of protected conduct, uniform statutes of limitations, uniform relief, the use of alternative dispute resolution means for handling complaints, appropriate hearing and appeal rights, subpoena power, and rulemaking authority.

With respect to categories of workers not already covered, ACUS recommended that the Congress "should review the categories of workers to which it is appropriate to extend whistleblower protection.

In the 100th Congress, the Department of Labor became involved with the Department of Transportation in connection with legislation to provide whistleblower protection to airline employees. The Department sent a letter to the House Committee on Public Works and Transportation, setting forth in considerable detail protections and procedures that should be included in that legislation. For example, the Department stated that whistleblower complaints made directly to employers should be protected. The letter also stated that a right to refuse work should be provided in certain circumstances. An employee deliberately violating an FAA rule should not be protected. There should be a 180-day statute of limitations. There were other comments as well.

Mr. Chairman, you introduced legislation in the 100th Congress, Senate bill 2095, which would have implemented some of the recommendations of ACUS by consolidating all responsibility in the Department and establishing a generally uniform whistleblower protection program to replace the existing Federal programs. It would not have imposed complete uniformity, however.

The Department of Labor testified on that bill. Although the Department took the position that it was appropriate to address the gap in coverage related to the airline industry, it also noted that more information was needed about the scope of the bill before it could take a position on the extent of authority to be created and whether it should be consolidated in the Department. Staff of the Department, particularly the Solicitor's Office, I would say, further provided extensive technical assistance to the majority and minority staffs of this subcommittee.

Now, in the 101st Congress, Mr. Chairman, you have introduced Senate bill 436, which would establish a safety and health whistleblower program to fill the gaps in existing Federal protections. It only contains two provisions that would amend existing programs—a uniform 180-day statute of limitations, and explicit subpoena power for the Secretary of Labor with respect to those programs in which the Secretary carries out either investigations or adjudications.

Accordingly, the bill appears more akin in nature to bills protecting specific groups of employees, like the airline industry bill, than to the recommendations of ACUS or the provisions of Senate bill 2095.

Mr. Chairman, this short review of the history of whistleblower protections is intended to explain the situation faced by Secretary Dole and the Bush administration as it formulates its position on whistleblower legislation. This overview illustrates that there are many approaches that can be taken with respect to this subject. There is the "shotgun" approach of the past; the "uniform" approach of ACUS, and the "fill the gap" approach of Senate bill 436.

You have made Secretary Dole extremely aware of your very keen interest in this subject. I can assure you that she shares your concern that appropriate safeguards be in place and be effective for the protection of whistleblowers.

However, unlike you, Mr. Chairman, who has been involved in the issue for a period of time, her exposure to the subject matter has been to date limited. She is extremely interested in the big picture and intends to get involved. But Mr. Chairman, she has been Secretary of Labor for only approximately 6 weeks to date, and there have been a myriad of issues commanding her time and attention. I would also note that in addition to being very early in Secretary Dole's tenure as Secretary of Labor, it is also very early in the Bush administration. The whistleblower issue is one of interest to a great many departments and agencies of the Government, most of which are headed by new appointees, and we need to consult and coordinate with them.

Mr. Chairman, Secretary Dole is not prepared at this time to present to you the administration's position on Senate bill 436. I am directed by the Secretary to tell you that the Department is studying in earnest your legislation and other proposals that have been made.

Thank you very much for your attention.

Senator METZENBAUM. Mr. Thorn, I want to thank you and I also want to particularly thank Secretary Dole. I know the original thought of the Department was not to send anyone on the basis that the subject has not been resolved, and the Department does not have a position. I spoke with Secretary Dole; she was very gracious and courteous, as she always is, and she indicated that the Department would send somebody to accommodate my request, but that it is premature for the Department to be expected to take a position at this time, and we respect that very well and understand that she has many items on her agenda.

If Secretary Dole were here, I would say take two more days, and let's get it resolved. But I know it is not going to be 2 days. It will be more than that. It is a priority concern of Senator Grassley, myself and the other Senators who are cosponsors, and I hope we can expedite the process, but we want to do it in a cooperative way, not in a confrontational way.

Let me say that we want to make it clear that the bill is bipartisan; it is based on a nonpartisan Federal study; it is designed to protect the public health and safety, and it is not a new issue for the Department.

These courageous whistleblowers, frankly, need protection, and we will be in contact with you shortly to see if we cannot move the process along in a joint undertaking.

I want to say that the Administrative Conference report that was issued in 1987 recommended several non-legislative improvements for handling whistleblowers complaints. The Conference called on the Secretary of Labor to promulgate rules of procedures, to consolidate investigations, to coordinate activities with substantive agencies, and to publish whistleblower decisions. As of last August, the Department had taken no action.

Do you know whether or not the Department has taken any action at all since that time, either in the old administration or the new one, to implement any of these recommendations?

Mr. THORN. I think, Mr. Chairman, that the thrust of the Department's concerns that came out of the ACUS report focused on the legislative matters and not the administrative recommendations that they made. I think you are aware that there was a task force of career employees at the Department that was formed. Unfortunately, by the end of the Reagan administration, some of those recommendations that needed to be considered by policymakers simply never got done. But to my knowledge, we have not addressed any of the administrative things that the Conference talked about.

Senator METZENBAUM. I would be grateful to you if you would be good enough to put this on the agenda to see whether or not the program can start. We know full well that even when the regulatory process starts, it does not occur overnight, and there is a time lag. The Secretary is not even aware of that responsibility contained in that legislation. I would hope you might bring it to her attention and to others' in the Department as well and see whether or not we cannot move the process along.

Mr. **Thorn**. I will be happy to do that, Senator.

Senator **Metzenbaum**. Now, last year, the Department supported a bill, although limited, protecting aviation whistleblowers. Is there a policy reason for treating aviation whistleblowers who currently lack a statutory remedy differently from workers in the meat and poultry industry, or the pharmaceutical industry, who also lack such a remedy when they report health or safety violations to Federal authorities?

Mr. **Thorn**. I am not sure I am prepared to answer that. I think that with the degree of help that the Department gave last year and the testimony on the House side with respect to that airline bill, I think perhaps that speaks for itself with respect to how the Administration felt at that time.

Senator **Metzenbaum**. I might point out that in support of the aviation bill last year, the Department publicly indicated support for the following concepts that are incorporated in the Metzenbaum-Grassley bill: protection for the right to refuse unsafe or illegal work; no requirement that an employee provide an employer with an opportunity to correct a violation except in refusal to work situations; no penalty against employees for bringing unsuccessful complaints, a 180-day statute of limitations; subpoena power for the Secretary, and authority to order immediate temporary reinstatement of employee whistleblowers.

As I understand it, these concepts are consistent with current Federal whistleblower statutes. Given the Department's support for these concepts in the aviation area, and their consistency with current law, I would hope the Department would not have any policy reason to change the public position that it has taken in connection with these important concepts as related to the aviation bill, and I would hope you would convey that back to the Department unless you know if there is some reason to treat other employees differently than those in the aviation industry.

Mr. **Thorn**. I think, Mr. Chairman, you have again, by making reference to those prior positions of the Department on the airline bill, simply called attention again to I think what Secretary Dole has asked me to convey, that there are some policy considerations with new people around and the new administration that certainly need to be looked at. But the technical assistance that was offered to this subcommittee staff last year on some of those same items, I think at least speaks for the prior Department of Labor in how it felt on some of those items.

Senator **Metzenbaum**. Thank you very much. We appreciate your appearing, and we look forward to working with you and the Secretary and the whole Department.

Mr. **Thorn**. Thank you, Mr. Chairman.

Senator **Metzenbaum**. Our next panel consists of James Simpkin of Loveland, CO, formerly employed as a technical specialist at the Hanford Nuclear Weapons Facility in Richland, WA; William Donald Wright of Enterprise, AL, formerly employed as an emergency medical services helicopter pilot in Houston, TX; and Donald

S. Henley of Ashboro, NC, formerly employed as a quality control supervisor at a meat processing plant in Ashboro, NC.

We are very happy to have you here. We respect you for the courage that you have indicated in the past as well as for your being with us today.

Mr. Simpkin, we are very happy to hear from you first.

STATEMENT OF JAMES W. SIMPKIN, LOVELAND, CO; WILLIAM DONALD WRIGHT, ENTERPRISE, AL, AND DONALD S. HENLEY, JR., ASHBORO, NC

Mr. **Simpkin**. Thank you, Mr. Chairman.

I want to thank you, Mr. Chairman, Senator Harkin, Senator Grassley, and members of this subcommittee for your concern regarding the protection of those of us who, in connection with their job responsibilities, come forward to expose what we view as serious improprieties in Government agencies.

I was employed at the Hanford Reservation in Richland, WA in the Quality Assurance Division for 4 years. Previous to coming forward and exposing very serious health and safety problems with regard to workers and the public, I had received exceptional performance ratings, letters of commendation, and was rapidly moving up the corporate ladder.

This trend came to an abrupt halt after I testified before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce. During that subcommittee hearing, the Assistant Secretary for Environment, Safety and Health, Mary Walker, stated that we deserved bonuses for our work in bringing these safety problems to light. Chairman John Dingell agreed and pursued this idea through the Secretary of Energy, John Herrington.

In the end, what we received for our contribution was far from being a bonus. Immediately following the first subcommittee hearing, I received a letter of reprimand which indicated that I was spending too much time writing memos on safety issues.

Management began to screen both my mail and telephone calls. During a meeting with my management, my job was threatened when I refused to comply with a request which was clearly inappropriate. I was called in by the executive vice president of Westinghouse Hanford Co., who told me that life would remain difficult for me at Hanford as long as I continued to cooperate with the subcommittee, who they viewed as their adversary.

Casey Ruud, a coworker at Hanford who also testified at the subcommittee hearing, was laid off within four months following his appearance before the subcommittee.

A second subcommittee hearing was scheduled to focus on the harassment and mistreatment of Casey Ruud and myself as a result of our participation in the first subcommittee hearing. It was at this hearing that Energy Under Secretary, Joseph Salgado, admitted that he and the Department of Energy failed to protect both Casey Ruud and myself from harassment. Mr. Salgado also stated that by not recognizing our contribution that the DOE's message to their organization was clear—and I quote—"kill the messenger."

Even though this admission was a milestone in that the Department of Energy had finally admitted wrongdoing, it was of very little benefit to me personally in my pursuit of an adequate remedy.

I would be remiss if I did not share with you what personal effects this has had on myself and my family. I was removed from a position which had a high degree of responsibility and transferred to a position in which I had no defined responsibilities, nor was it clear to whom I was to report. This continued for months.

This, coupled with the previously mentioned episodes of harassment, placed me in a continual state approaching nervous breakdown. I was asked by the company doctor to seek help because of my deteriorating physical condition. At one point, I was even incapable of helping one of my daughters on a fourth grade project.

Just prior to the second subcommittee hearing, I decided to resign from my position for fear that the harassment would continue and that it would continue to have a detrimental effect on both myself and my family. Immediately following the second subcommittee hearing, I resigned my position. I eventually had to file bankruptcy and accept a job out-of-State for considerably less money.

Recently, a worker at another DOE facility reported to the media that Casey Ruud and myself were on a black list within the Department of Energy at this facility.

Just prior to being laid off, Casey Ruud was transferred to the Basalt Waste Isolation Project, which is under the regulations of the Nuclear Regulatory Commission. This enabled Mr. Ruud to be able to file a complaint within the Department of Labor, which has jurisdiction on NRC-regulated facilities.

I was not as fortunate as my friend Mr. Ruud. Even though I worked at the same Hanford Reservation and worked in the same Quality Assurance Division as Casey Ruud, I was not assigned to the BWIP project, and thus my complaint was not under the jurisdiction of the DOL.

I did, however, file a complaint with the Department of Labor in case it was later determined that I was under the jurisdiction of the Department of Labor. The Department of Labor accepted my complaint, but later relinquished jurisdiction to the Department of Energy. Not once did I receive any information from the Department of Energy concerning my complaint.

As you might expect, I was not real comfortable knowing that the same agency that had failed to protect me from harassment by their prime contractor would be representing my interests concerning my complaint.

In closing, I want to thank you for allowing me to share with you my experiences concerning my attempts to improve safety at our Nation's weapons facilities and the resultant retaliation we suffered by those resistant to change.

I do not regret coming forward and standing up for the truth; I would do it again. However, I still have a lot of anxiety, realizing there was no one to turn to who had the responsibility to stand alongside me during this most difficult time.

Thank you, Mr. Chairman.

Senator **METZENBAUM**. Thank you, Mr. Simpkin.

I am advised that Senator Brock Adams wanted to be here to welcome you, and he has a statement for the record and is supportive.

[The prepared statement of Senator Adams follows:]

PREPARED STATEMENT OF SENATOR BROCK ADAMS

Mr. Chairman, we have had several cases in which contractor employees at Department of Energy facilities have come forward to disclose violations of regulations, or safety problems, or management problems, or even entire programs that were off-track or over-sold. At Hanford, a number of problems have been disclosed by courageous, patriotic and dedicated employees who have risked their careers and the alienation of their co-workers and perhaps even their personal safety to try to correct problems at these sites. I know that you have called one of those involved at Hanford as a witness in today's hearing and I want to pay a special tribute to him.

As a result of whistle blowers, the Congress and the public know more about leaks in the high-level waste tanks at Hanford. More about criticality problems at Hanford's plutonium processing facilities. More about safety problems at the N-Reactor. And even more importantly, we know that the internal procedures of the Department of Energy have not, and are not, providing the level of protection and accountability that they should be. Since these disclosures, it has become evident even to the Department of Energy that the system has not worked and I hope that those who risked so much to expose problems at the DOE facilities find some small comfort in the fact that these problems are finally getting the level of congressional, public and executive branch attention they deserve. I hope, Mr. Chairman, that those of us who are now in a position to correct the failed policies and practices of the past do justice to the sacrifices of those who have come forward and really do make things at the DOE better.

As has perhaps always been the case throughout history, the messenger is all to often mistaken for the message especially when an employee breaks ranks and "blows the whistle." In a situation like the one we have at Hanford where a large number of jobs are being lost, or are going to be lost, as aged, out-of-date plants are shutdown, whistleblowers are likely to come in for even tougher pressure to demure than the sorts of intimidation and discrimination ordinarily found in such cases. The real problem with DOE, of course, is not the disclosure of the problems, but that the system of self-regulation, of indemnification of contractors, of failed congressional and executive branch oversight left these problems to fester to the point where the entire nuclear weapons complex is at a standstill.

In the final analysis, it turns out that the whistleblowers were sometimes the only part of the DOE accountability and safety system that worked. The protection of whistle blowers, who comprise the final safety net when the rest of the government's system hasn't worked, must be assured.

I want to commend my colleague, the Chairman of the Subcommittee, Senator Metzenbaum, for his leadership on this issue. The bill before us will close many of the gaps in coverage for whistleblowers across the federal government. It also will make the procedures for dealing with these complaints more effective and timely. I ask that the Chairman add me as a cosponsor to this bill and am committed to working with him to help it through the legislative process.

We as public policy-makers have a responsibility to insure that there is a fair process available to whistleblowers. All too often, employees who have courageously acted to bring about change when there is a health and safety violation have suffered personal hardship through job loss and harassment. This should not be the case in a democracy like ours. I look forward to Mr. Simpkin's testimony and those of others like him who have undergone personal risk to insure a healthier workplace.

Senator METZENBAUM. Let me just say for myself that I serve on the Energy Committee; I have served there for many years. I get so damn angry when I hear that my Government says that you are an excellent employee, says that you are harassed, prejudiced, and biased by your employer because you spoke out, and then does nothing to protect you.

So I want to include in the record the statement of Mr. Joseph Salgado, Deputy Energy Secretary. I think Government has a keen sense of embarrassment, but I do not think it is all Government. I think it is the Department of Energy, that failed to stand up for you.

Furthermore, I think that Westinghouse ought to be ashamed of itself. The next time they seek to meet with me on some issue, I hope they will come in—and I am sure they have representatives in the audience—I expect them to give me an adequate answer as to why they discriminated against you.

To me, you ought to get a medal of honor. Instead of that, your family life had to be changed; your work habits had to be changed. You had to take a job at a lesser rate of pay, a job further from home. I just think that this is horrendous, and I think that Westinghouse ought to be ashamed of itself. I think they ought to offer you a job back doing the same thing you were doing. They ought to be proud to have somebody such as you in their employ. I think the Department of Energy ought to see to it that Westinghouse does it, or if not, bring Westinghouse on the carpet with possible termination of its contract.

I for one am proud of what you did.

[Statement of Mr. Salgado follows:]

SAFETY AT DOE NUCLEAR WEAPONS FACILITIES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON
ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

OCTOBER 22, 1987 AND MAY 17, 1988

Serial No. 100-138

Printed for the use of the Committee on Energy and Commerce

TESTIMONY OF JOSEPH F. SALGADO

Mr. SALGADO. Thank you, Mr. Chairman. I have a few brief comments. As you are well aware, I did not submit formal comments for the record.

This is a very disturbing hearing to myself, and to Secretary Herrington. It's disturbing because it calls in question the commitment of this Secretary and this Department to ES&H activities. And that is the commitment that this Secretary made initially when he first assumed the responsibilities, of Secretary.

And then he consolidated ES&H activities within the Department under one Assistant Secretary, and we have followed up that consolidation, by number one, appointing Mary Walker, and now appointing Ernie Baynard to assume those responsibilities.

The budgets from '85 to '88 increased 80 percent in that line item. The FTE's increased 72 percent. The '89 budget is increased by 63 percent despite the fiscal constraints. And we initiated the Technical Safety Appraisal and the environmental activities and survey baselines for the entire Department, because we were committed to move forward to improve, to enhance and to address what we believed to be institutional problems of aging facilities, and philosophical problems of how DOE and its contractors interrelate and how we manage them.

As you're well aware, Mr. Chairman, we invited in the National Academy of Sciences, to tell us, in nuclear safety, where we needed to improve. And they gave us a very critical report. They said, you need an outside advisory group, and we appointed one. And we asked Mr. Ahearne, the past Chairman of the NRC, to chair that group. They said, you need other technical information, to better interface with the commercial world, and we brought in INPO.

They said, you need to strengthen ES&H and we have done that in our 1989 budget with additional FTE's and other additional activities. They said, you need an on-site representative for ES&H, as an independent DOE oversight, on-site. You need those things, and we've commenced that at two of our facilities, and we're advertising for others. The answers aren't short-term, they're long-term, as you're well aware, Mr. Chairman, because you've dealt with these issues for years.

But we failed, at the same time. I personally believe that I failed the Department, the Department failed when we gave you assurances in the October hearing that these individuals who testified would not be subject to quote, "harassment," or bias or prejudice. I don't think we did enough to ensure the position of the Department vis a vis our contractor. And then there was disagreement, even among our own staff as to that issue, but I really believe that we failed, and I believe that I failed.

I did not involve myself in this, and that was negligence on my part. I admit it; it was negligence on my part. It was negligent, not so much to these individuals in this particular issue, but it was negligence in the fact that this issue itself runs to the very spirit of the ES&H activity that we've been embroiled in. It's the message that we sent, by not embroiling the higher levels in the Department.

I've reviewed this for the past two weeks. I have talked to the contractor, Dr. Jacobi; I've talked to my own people; I've talked to my ES&H people; I've talked to my field people. It is my personal opinion, first of all that we did fail as a Department, to assume some responsibilities—I admit that.

It's my personal opinion also, that Mr. Hermanson, Mr. Rudd, and Mr. Simpkin, are excellent employees. And they are the type of employees we have encouraged within our own ES&H organization; to attract those that ask the critical and inquiring questions that force us to address the issues that we need to address.

They were asking the right questions. On the pressure tube issue, those were the right questions to be asked at that particular time. I remember that controversy, because that was during the question of a start-up of the N-Reactor and were we on time.

In Mr. Simpkin's case, Mr. Simpkin's belief that he has been harassed is reasonable. I'm not addressing the question of whether in fact, he was harassed, because I have not interviewed all of the witnesses, but his belief is reasonable.

When you take the investigation that DOE did, and the subsequent activity between, I believe, Mr. Brown's activity and Ms. Smith's activity, his belief that he has been harassed, and has been prejudiced and biased, is a reasonable belief on his part. I can't escape that.

And I guess the other failure that we as a Department have is, we failed to acknowledge them. You're right in your letter. We failed to acknowledge them. And there is differing opinion in the Department as to that, but my personal opinion is, we did—we failed to acknowledge what they had done.

We failed for two reasons, or it had two impacts to it. Number one, we failed because we should have acknowledged it because it was the right thing to do. Maybe in different degrees, but we should have, because it was the right thing to do.

But probably more important from a DOE corporate standpoint, by not recognizing them, it's a signal that we sent into our own organization. As Mr. Starostecki said, I mean, there is this idea sometime when you just kill the messengers. If you end up killing the messengers, nobody's going to bring you the message.

So there were a series of failures on DOE's part—admitted, in my personal opinion, and I think in the opinion of a great percentage of people from DOE who sat here and listened to this today. Whether it was insensitive, lack of management, lack of training, I'm not quite sure. But there were some failures.

And that's why it's a disturbing hearing. It's a disturbing hearing because we have placed an awful lot of emphasis on ES&H activity, and we have fought battles internally with ourselves. We've fought battles with our contractors, and not just Westinghouse—prior to them. And yet we failed.

And probably not an insignificant point, but at a point in time when we needed to send some right signals, we didn't. Those are my general comments after sitting here and listening to this case, Mr. Chairman. We welcome your questions.

Mr. DINGELL. Mr. Salgado, the Chair has great respect for you, as you know, and great affection. And it is painful for me to hear you come in and say the things which you've just said, because of the respect and the affection that I have for you.

I will observe to you that the function of these hearings is not, in any way, to demean you or the Department. As you know, I have a very fine relationship and a great deal of personal respect and affection for the Secretary, who I regard as an outstanding public servant. And we have been—you and I and the Department and the Committee and the Secretary—grappling around with a number of problems related to these facilities.

It has been my hope that as we have done those things, we have conducted ourselves here, speaking of the Committee, in a way which is responsible, and which is betoken not only the respect and the affection we have for the Department, but also the sense that we have, that the Department and the Committee are working together to try and see to it that our joint responsibilities are carried out in the best fashion possible, in the broad public interest.

I want to say that I believe your statement does you great personal credit. It certainly indicates a policy on the part of the Department that I regard as very important in terms of seeing to it that we are able to work together to correct the problem so that the programs of the kind we're addressing here, can go forward successfully. I think that if we can continue to work in that spirit, we will be able to achieve that end. And the Chair wants to thank you and commend you for your comments.

The Chair recognizes the gentleman from Oregon.

Mr. WYDEN. Thank you, Mr. Chairman, and I want to associate myself with your remarks, and perhaps, just add another point or two. Your candor is very much appreciated, Mr. Salgado, but what concerns this Member of Congress is that the last couple of times you've come up before this Subcommittee, you have made similar statements.

You've been very candid about the problems and about how things are going to change, and yet, they still keep going on. And I think that what we have to really focus on now, is that the message isn't getting out to the grass roots. It's not getting out to the front lines where we can really change things.

And what I'd like to see us do, in particular, is not have hearing after hearing where you come, and make very candid statements—and none of us question your sincerity—and then the problems take place again, and you come before the Committee once more.

And I just want to see us do something about getting the strong message that you've given to the Committee, out at the grass roots, and for that reason, I'm going to pursue the matter further with the witnesses.

By way of a little bit of good news, I very much appreciate the letter you released today to me, making clear that this National Energy Contractors Council, this new group of contractors, when they get together, are not going to be able to send the tab to the taxpayers.

You all got back to us very promptly on that. I think it's just swell for these people to get together and talk about better oversight and safety and these things. I just don't want to see the taxpayers pick up the bill. As a result of the very clear letter that you have made public today, that's not going to happen, and I just want you to know that I appreciate that.

Mr. SALGADO. Thank you.

Senator **Metzenbaum**. I might just ask you before letting you go whether you could give me some idea of the kinds of harassment that you suffered.

Mr. **Simpkin**. Immediately upon returning from the first subcommittee hearing, they began to screen my mail and my telephone calls.

Senator **Metzenbaum**. Did they do that with other employees?

Mr. **Simpkin**. No, sir.

Senator **Metzenbaum**. And how did you know they were screening you?

Mr. **Simpkin**. There was a new employee who I had not even met who was told when she first started to stay away from me, that I was a troublemaker. So she just stood in the background and watched the things that were going on, and her opinion was much different than those who had talked to her, and she felt obligated to talk to me and also to the subcommittee and also to the Inspector General, to let them know—they asked her to watch what was going on and also not to receive any phone calls and not to open the mail because it was being screened by people within the Department.

Senator **Metzenbaum**. What does "screening" mean? Does that mean opening your mail?

Mr. **Simpkin**. Yes, sir. There were many instances of my mail being opened, which was never opened before.

Senator **Metzenbaum**. I have not practiced law for a long time, but I have some vague recollection that that is a violation of the Federal laws. I am going to ask my staff to check into that for me, and if it is, I am going to ask the Department of Justice to inquire into whether or not it is not an indictable offense.

Do you know who actually did the opening of the mail?

Mr. **Simpkin**. There was an investigation into the matter.

Senator **Metzenbaum**. Who conducted the investigation?

Mr. **Simpkin**. I believe it was the Department of Energy. They did some research, and they talked to the people who were in my department. And like I said, the mail had never been previously opened at work, and all of a sudden it started being opened. I reported that promptly to the Subcommittee on Oversight and Investigations.

Senator **Metzenbaum**. Did you take it up with your employer and ask why they were opening your mail?

Mr. **Simpkin**. I certainly did.

Senator **Metzenbaum**. What did they say?

Mr. **Simpkin**. They said it was standard procedure.

Senator **Metzenbaum**. Standard procedure to open employees' mail.

Mr. **Simpkin**. Yes, sir; that is correct.

Senator **Metzenbaum**. I am going to ask staff to follow up on that for me, please.

I cannot believe that in America, a company is opening mail. There is no claim that you are a subversive or anything of the kind. Quite the opposite.

Mr. **Simpkin**. There were numerous other cases of harassment that were similar to this. Immediately upon returning from the hearing, within 30 days, they also gave me a letter of reprimand. It was written up, handed to me. It stated that I was spending too much time on the phone concerning safety issues——

Senator **Metzenbaum**. This was signed by Westinghouse?

Mr. **Simpkin**. Yes, sir; my supervisor, and a letter was to be sent to the file. Well, immediately, I questioned the contents of that reprimand, and stated that I felt that it was directly related to my participation with the Subcommittee on Oversight and Investigations. The person who handed me the memo called the Westinghouse attorney, who tried to ask me to please return the letter so that they could destroy it. I promptly sent it to Chairman Dingell. Later the Department of Energy, in their investigation, determined that the letter of reprimand was undeserved and removed it from my files.

Senator **Metzenbaum**. Did you get a letter denying you access to Department of Labor remedy?

Mr. **Simpkin**. I filed a complaint with the Department of Labor. They at first accepted it, and then later sent me a letter saying that they did not have jurisdiction in my case. I asked them who might have jurisdiction, and they stated that the Department of Energy had jurisdiction.

Senator **Metzenbaum**. A copy of that letter from the Department of Labor will be included in the record.

[Letter from Department of Labor follows:]

June 29, 1988

VIA AIRBORNE EXPRESS

Gordon L. Wilson
Area Director
Employment Standards Administration
Wage and Hour Division
U. S. Department of Labor
909 First Ave., #1060
Seattle, WA 98174

Dear Mr. Wilson:

In the event that I am covered by the Energy Reorganization Act, I hereby file a complaint with the Department of Labor pursuant to 42 USC 5851 against Westinghouse Hanford Company and Rockwell. I also request consideration of my claim under the Safe Water Drinking Act and Toxic Substances Contact Act, if applicable. The basis of my complaint is that Westinghouse Hanford Company and Rockwell engaged in a continuing pattern of discrimination against me during my employment with them for activities protected under the Energy Reorganization Act. These activities included but are not limited to my attempts to continue to cooperate with the ongoing investigation by the U. S. House of Representatives Subcommittee on Oversight and investigations of the Committee on Energy and Commerce. As a result of this continuing discrimination, I was forced to terminate my employment in June 1988.

I request that I receive my lost wages, past and future, compensatory damages, actual damages, and an award of exemplary damages.

If necessary, further information can be supplied upon request.

Sincerely,

Jim Simpkin

JUL 8 RECD

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
909 First Avenue . #1060
Seattle, Washington 98174

Reply to the Attention of:

July 6, 1988

Jim Simpkin
c/o Velikanje Moore
and Shore PS, Inc.
405 East Lincoln
Yakima, Washington 98901

Dear Mr. Simpkin:

This will acknowledge receipt of your complaint regarding your employment with Westinghouse Hanford Company, alleging violations of the Energy Reorganization Act, the Toxic Substances Control Act, and the Safe Drinking Water Act. Your complaint was received in this office on June 30, 1988.

The Act requires the Secretary of Labor to notify the person named in the complaint of its filing and to conduct an investigation into the alleged violations. Consequently, we are providing Westinghouse Hanford Company with a copy of your complaint and advising of the Wage and Hour Division's responsibilities under these laws. We have enclosed copies of the pertinent sections of the Acts, and a copy of Regulations, 29 CFR Part 24 for your information.

This case has been assigned to Compliance Officer Tom Sampson, whose first action will be to try and achieve a mutually agreeable settlement through conciliation. If this is not attainable, an investigation will be conducted as soon as possible. If you have further evidence, please give it to our representative who will contact you on this matter. If you have any questions, do not hesitate to call me in Seattle at (206) 442-4968 or CO Sampson at (206) 259-0249 in Everett.

Sincerely,

Gordon L. Wilson

Gordon L. Wilson
Area Director

Enclosures

cc: Nuclear Regulatory Commission
Environmental Protection Agency
Blaine L. Tamaki

XEROX TELECOPIER 295 ; 2-23-89; 1:51 PM;
02-23-89 THU 15:43 VM&S, INC.
P.02
AUG 17 1983

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
909 First Avenue . #1060
Seattle, Washington 98174

Reply to the Attention of

Mr. Jim Simpkin
C/O Velikanje, Moore
and Shore, Inc., P.S.
405 Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Re: Westinghouse Handford

We have been advised by Mr. Fred Rutt, of the Department of Energy, Industrial Relations Branch, P.O. Box 550, Richland, Washington 99352, that their agency has jurisdiction over the matters outlined in your complaint. Consequently, that agency will be handling your complaint. You may wish to correspond directly with Mr. Rutt at the above address.

Sincerely,

G L Wilson

Gordon L. Wilson
Area Director

Senator METZENBAUM. Mr. Ruud, who also blew the whistle on the Hanford plant, was allowed to proceed before the Department of Labor. How do they distinguish between you and him?

Mr. SIMPKIN. Mr. Chairman, Casey, just by chance, was transferred to the Basalt Waste Isolation Project. That project was under the regulation of the Nuclear Regulatory Commission. It was just by chance that he was transferred there. I was not as fortunate to be under that project. I was under the Department of Energy side, which the Department of Labor does not have jurisdiction.

Senator METZENBAUM. Were there other forms of harassment?

Mr. SIMPKIN. Yes, sir, there certainly were. The executive vice president of Westinghouse called me in for a meeting and told me that the Congressional subcommittee was their adversary and that there were many subcommittees, in their opinion, that were out to shut down our weapons facilities. He mentioned to me that life would continue to be difficult for me at Hanford as long as I continued to participate and communicate with congressional committees.

Senator METZENBAUM. What is the name of that man?

Mr. SIMPKIN. Mr. John Nolan.

Senator METZENBAUM. And he was in Hanford, stationed there?

Mr. SIMPKIN. Yes, sir.

Senator METZENBAUM. And he is the executive vice president of that operation.

Mr. SIMPKIN. That is correct.

Senator METZENBAUM. Let me get this clear, now. Mr. Nolan is on Westinghouse's payroll, but all the expenses of Westinghouse are paid by the Department of Energy, is that correct; it is a management contract, is it not?

Mr. SIMPKIN. That is correct as far as I know.

Senator METZENBAUM. Tell me about when this occurred that Mr. Nolan called you in.

Mr. SIMPKIN. I believe it was December 7 or 8 of 1987.

Senator METZENBAUM. And he said to you that you were testifying before the House subcommittee, and the House subcommittee is the enemy; is that pretty much his statement?

Mr. SIMPKIN. Yes, that is what he stated, and I took exception to that, because this particular congressional subcommittee has the responsibilities of oversight of those facilities. So we had a long discussion on that.

Senator METZENBAUM. Did you discuss that matter with the subcommittee?

Mr. SIMPKIN. Yes, sir; I did.

Senator METZENBAUM. What was their response?

Mr. SIMPKIN. They were very distressed with that, and at the second subcommittee hearing, pursued that and asked if that was the official position of Westinghouse.

Senator METZENBAUM. And they asked that of Westinghouse?

Mr. SIMPKIN. Yes.

Senator METZENBAUM. What did Westinghouse say?

Mr. SIMPKIN. That that was not the position of Westinghouse.

Senator METZENBAUM. I will ask my staff to check and find out what has happened to Mr. Nolan, whether he is still with the company, whether his salary has been increased or decreased or whatever else has happened to him.

After what you have been through, what would you say to other nuclear weapons workers about blowing the whistle on safety hazards?

Mr. SIMPKIN. Mr. Chairman, I am faced with that on a monthly basis. I have people call me who ask me if it would be wise to do that. And what I share with them is that it is my conviction that if lives are involved, if the lives of my coworkers, the lives of the public are at risk, then I will stand up and tell the truth and pursue those things, because I could not live with myself if I did not. And I ask those who call me to count the cost. If there are lives involved, would they be able to live with it if there was a serious accident that resulted in either injury or loss of life, if they could live with that.

Senator METZENBAUM. These are coworkers who worked with you at the same facility?

Mr. SIMPKIN. Yes, sir.

Senator METZENBAUM. How recently have some of those calls come in?

Mr. SIMPKIN. I received an anonymous phone call within a month.

Senator METZENBAUM. Within a month from today?

Mr. SIMPKIN. Yes.

Senator METZENBAUM. I will also ask my staff to find out for me what the safety record is at Hanford and if necessary, we will ask for a special investigation to be made.

Senator Adams has asked me to ask you two questions. First, where did you encounter the most difficulty in getting your concerns addressed—at the contractor level, or the Department of Energy level?

Mr. SIMPKIN. I would say it would be a tie. They were both equally difficult to work with. While I was going through these periods of harassment, I was continually, on a daily basis, contacting the manager of the Department of Energy and relating to him exactly what the problems were. The Department of Energy's manager at Hanford, Mr. Lawrence, called me in for a meeting. We discussed in detail the problems that were at Hanford. I was fully expecting a follow-up on that; there was none.

Senator METZENBAUM. To your knowledge, have the safety concerns you raised at the Hanford site been addressed to date?

Mr. SIMPKIN. There has been some resolution to some of the issues that I was involved with. They, of course, have not addressed the major problem, which I view is the lack of accountability within the weapons facilities.

Senator METZENBAUM. Mr. Simpkin, you are to be congratulated. I think your Government has treated you shabbily, and Westinghouse has treated you shabbily. But I agree with you that you probably sleep better at night now—except there is not any reason that any employee should have to pay the kind of price that you have paid. I think we in Government have a responsibility, and we ought to be embarrassed that we would permit that to happen, particularly at a Government facility.

Thank you very much.

Mr. **Simpkin**. Thank you, Mr. Chairman.

Senator **Metzenbaum**. Our next witness is Donald Wright. Mr. Wright, we will be happy to hear from you, sir.

Mr. **Wright**. Senator Metzenbaum, committee members, ladies and gentlemen, it is indeed a pleasure and an honor to have been invited to speak before the Subcommittee on Labor of the Senate Labor and Human Resources Committee meeting, to discuss the Employee Health and Safety Whistleblower Protection Act. I hope that any information I provide will be of assistance in furthering the goals of this committee.

My name is William Donald Wright, and I am 39 years old. At the present time I am a chief warrant officer in the U.S. Army. I am a helicopter instructor pilot and company safety officer at the Army Aviation Center in Fort Rucker, AL.

My initial military career began in early 1973 and lasted for over 7 years. During that time I was awarded the Good Conduct Medal, the National Defense Medal, certificate of achievement award, the Army Commendation Medal, numerous letters of appreciation. During flight school, I was selected as the class leader and was an honor graduate. I was one of only five American pilots selected to train with the German Army, and completed the German Army mountain flying course. I was twice selected to represent the U.S. Army in the International Helicopter Heli-Cup competition and won first place in 1978.

I left the service in 1980 with an impeccable military record to pursue a career in commercial aviation.

My civilian experience includes aviation safety consultant to hospital air ambulance programs and aircraft companies; aviation training consultant for aircraft operators and flight training companies; author of numerous articles on aviation safety published in industry trade publications; co-author of a chapter on patient transports in a medical textbook and cofounder of an aviation safety organization. I hold a commercial helicopter and commercial fixed-wing rating, with over 6,000 hours of flight experience.

In 1984, I was offered a position as an emergency medical service, EMS, helicopter pilot at Hermann Hospital in Houston, TX. I was offered this position by someone I had worked with on a previous occasion.

As you probably know, an EMS helicopter pilot flies between hospitals and to and from accident sites to transport patients for emergency medical treatment. The nature of the mission and the demands of the job make the EMS pilot somewhat unique in the aviation community.

Air ambulance programs are normally operational 24 hours a day, 365 days a year. Helicopters are almost always flown with a single pilot and two or three medical personnel onboard. Aircraft are dispatched on a moment's notice, with little or no time for flight planning. Many missions are flown directly to the scene of an accident, requiring helicopters to land in streets, yards, parking lots, or any other convenient location both day and night.

Because many vehicle accidents are weather-related, the aircraft is often flown in the same bad weather that caused the accident. Pilots, in order to meet the demands of the medical emergencies, have been required to work an abnormally high number of hours on erratic and rotating schedules.

In addition to the mental and physical stresses imposed on the EMS pilots, the psychological stress of trauma and the life and death nature of the mission demand that pilots be at the absolute peak of performance any time they are available to accept a flight.

The hospital where I worked operated five twin-engine helicopters. Three were located in Houston, one in Galveston and one in Beaumont. At the peak period, there were 15 pilots employed to work the schedule, but generally there were less than that because of illnesses, vacations, National Guard duty, and attrition.

Under the best conditions, then, a pilot could expect to be on duty a minimum of 56 hours per week. This was considered a "normal" work week and not overtime. This does not include driving time to the various locations of the aircraft or overflights when a mission was received immediately prior to shift change.

The emergency mission itself could last anywhere from a minimum of about 1 hour to over 6 hours. The patients we transported ranged from heart patients, gunshot victims, stabbing victims, auto pedestrians and drug overdoses, to babies only a few days old and abused children. The only thing consistent about the missions was the surety that someone's life was at stake.

For an EMS pilot, participating in a lifesaving effort is one of the most satisfying feelings ever experienced and one of the most noble uses of aviation assets ever developed. I considered each and every pilot where I worked a professional and extremely dedicated and proud of the job they were doing.

In spite of that attitude, the number of hours we were required to work and other major safety considerations created an intolerable situation in which to operate. Regardless of our approach or the manner in which we tried to address these problems, the aviation management decidedly refused to listen or acknowledge our concerns. The following examples are cited.

One, the aircraft we operated lacked a patient loading system. Most other programs operating similar aircraft were provided a system to alleviate having to physically lift and manipulate the patient into the aircraft. In spite of the fact that all 15 pilots had injured their backs, three requiring medical attention and lost work, we were unable to convince the management of the need to purchase a loading system.

Second, inoperable and faulty radios in the aircraft were a frequent occurrence. For nearly a year, pilots had requested new or improved communications equipment for the helicopters. It was not until a patient almost died because the physician onboard the aircraft could not talk to the hospital and make his needs known that any action was taken to solve the radio problem.

Third, numerous mishaps had occurred with the aircraft, including cowlings and doors coming off in flight, blade strikes, mechanical problems forcing the aircraft to make emergency landings, and frequent near-wire strikes. Most of these mishaps required reports to be filed with the Federal Aviation Administration. We were told by the management that these reports had been filed, even though there was never any follow-up or action taken. According to records of the Federal Aviation Administration and the National Transportation Safety Board, no reports have been filed.

Fourth, due to the limited number of pilots on the schedule, we were required to violate the crew rest requirements established by the Federal Aviation Administration on a regular basis. We sought the addition of a fourth pilot per aircraft to prevent violating Federal safety requirements and endangering the lives of the crew onboard the aircraft, the patients, and the public.

Even though the nurses were staffed double the number of pilots, we were denied the addition of an extra pilot per aircraft because of the following reasons. First, we were told that insufficient funds were available; second, we were told that our missions were considered emergencies by the Federal Aviation Administration and that the regulations did not apply. This is incorrect. Third, we were told that reports were filed with the FAA each time a pilot exceeded crew rest requirements and permission for this violation was granted. This is also not true. Fourth, In a taped interview, hospital management stated that the pilots only worked approximately 44 hours per week. Shortly before this interview took place, I personally averaged over 80 hours per week for 4 weeks in a row.

By February 1985, we decided that bold steps were needed in order to express our growing concern over safety problems. We wrote a letter to the President of the administration of the hospital, stating that we felt there was a "major compromise of safety involved with our work schedule" and requested a meeting with hospital administration to discuss our concerns. The letter was signed by all 15 pilots.

Our anticipation of meeting with the administration was quickly dampened when we not only received no response to the letter, but were instead threatened with replacing all 15 pilots. Individual pilots were singled out, intimidated and harassed. I was transferred to the Galveston base permanently, adding three hours of driving time to a scheduled 12-hour duty day. Other pilots were paid mileage and expenses while working in Galveston. I was not. Although I had a perfect work record without a blemish, I was given the lowest job evaluation ever given a pilot. I was told that if I valued my job, I would keep quiet about safety problems and not discuss any issues with the medical personnel or the Federal Aviation Administration.

Individually or as a group, the pilots had sought help from a number of sources. Initially, everything we did was kept in-house in an effort not to embarrass or reflect in a negative manner on anyone.

The following is a list of the individuals or organizations contacted and their response to our request for assistance: First, the chief pilot recommended that we do not discuss safety issue with medical personnel because we might frighten them; second, the director of aviation management directed us to show up for work, do our jobs and keep our mouths shut; third, the director of environmental safety initially had interest, and concern was expressed for our situation, but after being rebuked by the hospital, any further involvement was declined; fourth, the Federal Aviation Administration—a cursory review of a proposed schedule and discussion with the management proved to be satisfactory, and no pilots were questioned about their actual work schedule; fifth, the Department of Transportation—we received no response; sixth, the National Labor Relations Board—the Labor Board had filed approximately ten charges relating to labor practices against the hospital on behalf of myself and one other pilot. No action was taken relative to the safety issues.

With respect to the NLRB charges, the hospital denied all allegations. A hearing was scheduled for January 1986. The day before the hearing, I, along with the other pilot represented by the NLRB, was fired. The hearing was delayed for over a year. In the meantime, the hospital attempted to prevent us from collecting unemployment compensation. In seven separate judgments by the Texas Employment Commission, it was resolved that we were terminated "without cause", and we received full compensation.

A few weeks before the rescheduled NLRB hearing was to take place, the hospital settled by providing 100-percent relief for all charges. This included resolving not to threaten pilots, not to harass pilots, changing my low performance evaluation, paying me a small amount of money owed for commuting to Galveston, and posting a notice saying that they would not engage in unfair labor practices. My termination was not addressed by the NLRB.

A law firm in Houston recognized my plight and offered to file suit against the hospital on a contingency basis. After more than 2 years of gathering information, substantiating allegations, and gathering evidence to support my claims, the case was simply dismissed from Federal court without so much as the opportunity to present my arguments. My understanding of this ruling is that the Federal court claimed no jurisdiction in the matter.

Within 1 year after the letter was written complaining of safety problems, nearly half of the pilots had been fired or forced to leave. None have been able to obtain any sort of remedy for their circumstances.

Each pilot who resolved to not bow to the pressure of the hospital management suffered in one form or another. As for me, I lost my job, my reputation, my ability to obtain comparable employment due to being blackballed, my savings and my home.

I have just recently returned to active duty in the U.S. Army.

The pilots where I worked tried to work within the system to solve serious safety problems. When all avenues had been exhausted, we blew the whistle in order to protect ourselves, our medical crew members, our patients, and the public. That action has cost us much more than financial loss. The personal degradation for some of us has rocked the very core of our lives. Employees, especially those directly responsible for public safety, should not be forced to choose between turning their heads to safety problems and their livelihood.

Once again I thank you for this opportunity to be heard. Perhaps my story, which is one of the many, will inspire you to provide much-needed protection for those who risk everything in the belief that right, justice and honesty will prevail. I have seen not only in my life, but in the lives of many others, that belief seriously shaken.

Thank you.

Senator **Metzenbaum**. Mr. Wright, did you prepare this statement?

Mr. **Wright**. Yes, sir, I did.

Senator **Metzenbaum**. Yourself?

Mr. **Wright**. Yes, sir.

Senator **Metzenbaum**. It is exceptionally well-written, coordinated, organized, and I give you a lot of credit; you are a smart man, and you have been very unjustly treated.

Prior to your firing by the hospital, had you ever had any employment problems either as a civilian or in the military?

Mr. **Wright**. No, sir. I have held part-time jobs since I was approximately 13 years old, and except for short breaks between jobs, I have held full-time positions since I was 17. I have never been fired, rebuked, asked to leave or any other negative action taken against me.

Senator **Metzenbaum**. I understand that after you were fired, a Federal inspector did review your employer's emergency medical service program. Did that inspection uncover violations that could endanger the public's safety?

Mr. **Wright**. Yes, sir. The NASIP report of the hospital is significant for a number of reasons. One, it shows how broad the spectrum of irregularities lie; two, it reflects the overall attitude and approach the organization takes with respect to safety; three, and most importantly, this inspection covered approximately 1 year's worth of records from early 1987 through early 1988. The hospital was briefed about the inspection in December 1987, and the actual inspection took place in March 1988. They knew and had ample time to prepare for the inspection.

At the time of the inspection, the hospital was in the best condition they had ever been in for an inspection of this type. In spite of that, a 31-page report was issued by the FAA after the hospital inspection, revealing numerous Federal violations. Had the inspection taken place while I was there, the violations would have been multiplied tenfold.

While the findings in the NASIP report are not all life-threatening, many are or could be. I think the important point to remember is that, at their very best, they fell far short of acceptable safety standards.

Senator **Metzenbaum**. The Hermann Hospital in Houston, TX, were they the employer, or was there a separate company that had the helicopter service?

Mr. **Wright**. No, sir. Hermann Hospital operated Part 135, the commercial operating certificate. They operated the helicopters.

Senator **Metzenbaum**. Is that a profit hospital or nonprofit hospital?

Mr. **Wright**. A nonprofit hospital.

Senator **Metzenbaum**. The administrator never gave you any cooperation, never responded to your concerns?

Mr. **Wright**. No, sir. Our letter, signed by 100 percent of the pilots there, was never officially recognized, never answered.

Senator **Metzenbaum**. It was never answered.

Mr. **Wright**. No, sir.

Senator **Metzenbaum**. Has there been any publicity on this matter in Houston?

Mr. **Wright**. Yes, sir. Some local media attention was given, and "20/20" did a piece specific to Hermann Hospital.

Senator **Metzenbaum**. I will tell you, it bothers me when people who run so-called "nonprofit" institutions do not give a damn about their employees, are not concerned about their health problems, about the safety of their planes, and use retaliatory procedures such as this—but I guess it is only fair to say that there are probably some very good nonprofit hospitals and some not so good. As a matter of fact, I guess I could confess to you and say that I was the treasurer of a large nonprofit hospital, and I think the administrator's major concern was trying to keep his employees from being unionized.

Would you blow the whistle on aviation safety problems again if it came to your attention in the private sector?

Mr. **Wright**. Sir, I would be less than honest if I did not admit to the least amount of pride in having taken a position that was just and right, and sticking with it in spite of a tremendous amount of pressure to abandon my cause.

Having said that, though, honesty also requires that I review the reality of the situation. My position resulted in professional, personal and financial devastation beyond my wildest dreams. The organization that did this to me, in an effort to cover up their own wrongdoing, as it stands right now, has escaped any repercussions for their actions, and perhaps worst of all, is not even obliged to answer my charges in a court of law.

In answer to your question, if I knew the outcome would be as it is, I would be reluctant to try and correct the safety problems. Instead, I would be inclined to turn my back and walk away.

Senator **Metzenbaum**. The only employer that you could find willing to accept you was the U.S. Government, the Army.

Mr. **Wright**. Yes, sir. After 2½ years of trying to obtain a comparable job in the EMS helicopter industry, I was unable to obtain employment, and I applied for and was accepted to return to active duty.

Senator **Metzenbaum**. Do you think that this situation in the EMS industry is a prevalent one, or do you think that it was particularly a problem at the Hermann Hospital in Houston?

Mr. **Wright**. Well, after my termination, I became very vocal and outspoken on safety issues, and because of that, many people contacted me from across the country and expressed similar problems and concerns. They contacted me because I could act as a spokesperson, without fear of retaliation, and they could not. So it was quite prevalent throughout the country.

Senator **Metzenbaum**. I am going to try to figure out some way to check the emergency medical services that are such a prevalent, widespread business today in this country, to find out exactly what kind of protection or checking of their equipment is done. In addition, I would like to check on the personnel practices.

I would ask staff to try to get the FAA to help us; if no one else, we will figure out some other agency.

I appreciate very much what you have done, Mr. Wright. I think you are a good citizen, and I am grateful to you.

Mr. **Wright**. Thank you, sir.

Senator **Metzenbaum**. Donald Henley, we are happy to have you with us, sir.

Mr. **Henley**. Mr. Chairman and members of the subcommittee, thank you for inviting my testimony today.

My name is Donald Henley. I have worked in the meat industry, both as a quality control supervisor and now for the USDA as a slaughter inspector.

Both jobs had something in common—the duty to protect the public from unsafe food. Although I am proud of my work at USDA, I did not have the right to do my job in private industry. I was told to leave the first time my duties interfered with company profits.

I worked at a country ham plant in the South. I cannot identify the company for the same reason we need your legislation giving rights to whistleblowers. I have friends who still work there. They can be and are fired at will if the owner gets upset.

I do not want to be unfair. I worked at a pretty good plant. But even at the good plants, workers accept the rules of the game. If you want to keep your job, you follow orders and do not talk back. It does not matter if the order is illegal; you do what you are told. Above all, you do not tell the Government when the company is violating the law, or you will be out the door.

When I worked in the industry, I just did not have the freedom to do the right thing.

I was a quality control inspector for around 6 months. The first month all went along fine, as long as my job was window dressing. But as soon as something came up that could interfere with profits, profits won and kept winning, until I said "No" and was promptly fired after stopping the company from processing 3,000 pounds of ham that were only half-cured and presented a problem with spoilage.

The owner had complete control of the operation. During my 18 months at the plant, I only knew of two other employees who stuck their necks out. They were fired, too. They were the two quality control supervisors who tried to set up a program before I did.

There were two levels of reality where I worked—the company president's promises to obey the laws when the USDA inspector was around, and the opposite attitude when the inspector left.

For example, the USDA inspector wanted us to get individual, labeled bins to separate condemned, inedible products from those approved for the public to eat. Although the owner kept saying okay, we never got any.

Sometimes the meat was in the inedible pile because it had been returned for broken seals in the packaging. Breaking the vacuum seal caused the hams to become putrid, with a slimy texture, green color and molds. On other occasions, it was diseased. For example, cancerous carcasses had yellow, semi-liquid formations like pus pockets, sometimes the size of a fist.

The USDA inspector told us to buy basic equipment such as bait boxes to keep rodents out of the dry storage area. Even for such minor, routine expenses, the president either refused to spend the money, or stalled on it.

I felt caught in the middle. I tried to follow through with the company president to carry out his promises to the inspector, but the president always acted irritated when I pressed an issue. That seemed to be his general view toward quality control.

He had an even lower opinion of the Federal inspection system, often making comments such as "piss on the USDA." He made it clear that the plant was his property, not the USDA's, and that he would do as he pleased. More than once, he reminded me that it was his name on the bottom of my paycheck, and not to forget it. I knew that sooner or later I might have to make a choice between my paycheck and my values.

It happened in January 1987. For a few weeks, no hams had been cured and sent to processing, and we were only about halfway through the drying cycle before the curing would be complete. The president was anxious, and he wanted to start sending out processed hams right away. He ordered around 3,000 pounds to be removed from curing and processed.

I knew this was illegal. I also knew I would feel guilty if I let those hams go out. They had a high chance of spoilage. This meat was not even close to being finished curing. What bothered me most was that consumers may well have been unable to tell until they ate the ham and possibly got sick.

The warning signs from spoilage do not become obvious until it is more extreme. In other words, the public was going to get blindsided.

I told the company president about my concerns. He said he knew the hams were not ready, but he was going to run them anyway, and not to say anything to anyone.

I could not do that. I reported the planned violation to the USDA inspector. He succeeded in frustrating the owner's scheme by putting a retain tag on the door of the drying room so that the meat could not be removed early.

After an uneventful weekend, I arrived at work on Monday morning. I was fired on the spot. The company president walked over and said some spoiled ham was going out. This was the same ham I had warned him about 3 days earlier. The president then added, "I am going to have to let you go, Don."

I was shocked and asked, "What are you talking about?"

His answer made it pretty clear. "We don't need you around here. You are fired. Now, go on and get out."

I saw the USDA inspector arriving, so I left to tell him what had happened. He, too, seemed shocked and upset and said he would see what he could do. We walked toward the entrance together, but the processing superintendent came out to stop us. He warned, "The best thing you can do it forget about it and get on out of here."

There was nothing the USDA inspector could do, either. I had no rights and was on the plant owner's private property. I left angrily and was in a rage for several weeks. But that did not change anything.

By the time the USDA inspector and I had gotten back, the rest of the plant employees were arriving at work, and everyone knew what was happening. They all got the message, too. Many said they thought what happened was wrong, but they also said I should have known better.

Since I left, to my knowledge, no one else has repeated my mistake of sticking his neck out. There is no longer a quality control supervisor, either. The three production supervisors now split that duty.

If the whistleblower bill had been the law in 1987, I believe things would have turned out differently. Obviously, I had done nothing wrong.

The company did not even bother to go through the motions of a kangaroo court by explaining the charges or getting my side of the story.

I am confident that with testimony from the USDA inspector, I would have won if I had had any rights. As it was, the company's excuse was not worth taking seriously, but I was left helpless.

For nearly a year, I worked at lesser jobs. I was lucky to be unmarried and to find work at all, but it still cost several thousand dollars. A little over a year ago, I was hired by USDA as a slaughter inspector.

Currently, I work at one of the better poultry plants in the industry. Even here, however, employees know better than to challenge profits and do not dare to cooperate with me openly. As one of my colleagues told me, the way it is set up, quality control is a joke. Anyone who sticks his neck out will get fired.

It would be great to get their cooperation, because even good plants can do better. The difference between company and USDA public health standards is like night and day.

It is funny how company quality control does processing checks and consistently does not find problems. But USDA inspectors come behind and consistently find tumors, fecal contamination, busted gall, hairs, feathers, bruises and other defects. The USDA inspectors find diseases like air sacculitus, in which yellowish tissue and pus is inside the body cavity. USDA keeps finding cadavers the quality control staff somehow miss. This is strange, since the cadavers are red from all the internal blood released when live birds improperly were put in the scalder and drowned. It seems like even at a good plant, the quality control staff cannot admit the obvious if it costs the company money.

There is no doubt about what I have learned from my experiences on both sides of the fence. Private workers are not going to stick their necks out if they cannot defend themselves. I do not know if I would again, either.

The first time I tried to do the right thing without my rights, I got my head chopped off. If the whistleblower protection law gets passed, maybe employees can do the right thing and keep their heads. That is why I am testifying today.

[The prepared statement of Mr. Henley follows:]

TESTIMONY OF DONALD HENLEY

on the

EMPLOYEE HEALTH AND SAFETY WHISTLEBLOWER PROTECTION ACT

before the

Subcommittee on Labor,
Senate Committee on Labor and Human Resources

March 7, 1989

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting my testimony today. My name is Donald Henley. I am testifying on behalf of myself and not as a representative of my current employer, the United States Department of Agriculture (USDA). I have worked in the meat industry both for the industry in 1986 and 1987 as a quality control (QC) supervisor and, currently for USDA as a slaughter inspector. Both jobs had something in common -- the duty to protect the public from unsafe food. Although I am proud of my work at USDA, I didn't have the right to do my job in private industry. I was told to leave the first time my duties interfered with company profits.

I worked at a country ham plant in the south. The plant employed around 40 workers and put out 500-700 hams per day, with customers that included fast food franchises. I cannot identify the company for the same reason we need your legislation giving rights to whistleblowers. I have friends who still work there. They can be and are fired at will if the owner gets upset. After what happened to me I can't in good conscience risk riling him up again.

I do not want to be unfair. I worked at a pretty good plant, not an industry lemon. But even at the good plants workers accept the rules of the game: if you want to keep your job you follow orders and do not talk back. It doesn't matter if the order is illegal. You do what you're told. Above all, you don't tell the government when the company is violating the law or you'll be out the door.

When I worked in the industry, I just didn't have the right to do the right thing.

It's dangerous to leave meat industry workers and the public at the mercy of plant owners' sense of honesty and justice. I was a quality control inspector for around six months. For the first month all went along fine as long as my job was window dressing. But as soon as something came up that could interfere with profits, profits won, and kept winning, until I said no and was promptly fired after stopping the company from processing 3,000 pounds of hams that were only half cured and presented a spoilage threat.

The owner had complete control of the operation. During my thirteen months at the plant I only knew of two other employees who stuck their necks out. They were fired, too. They were the two QC supervisors who tried to set up a program before me. My friends said I was foolhardy and should have known better. I was foolhardy, because I was more and more frustrated at having to keep quiet as the law was broken, and because things reached the point where I expected someone to get sick from the hams. Examples of my frustrations are listed below.

UNENFORCED LAWS

There were two levels of reality about public health and safety laws where I worked -- the company president's promises to obey the laws when the USDA inspector was around, and the opposite attitude when the inspector left.

For example, the USDA inspector wanted us to get individual, labeled bins to separate condemned, inedible products from those approved for the public to eat. Although the owner kept saying OK, we never got them. I don't know if any condemned meat got mixed in with the public's, but the way they were stacked it could have happened.

That would have been shameful. Sometimes the meat was in the inedible pile because it had been returned for broken seals in the cryovac packaging. Breaking the vacuum seal caused the hams to become putrid, with a slimey texture, green color and molds. On other occasions it was diseased. For example, cancerous carcasses had yellow, semi-liquid formations like puss pockets sometimes as big as a fist.

The USDA inspector told us to buy basic equipment such as light covers to protect the products from glass, and bait boxes to keep rodents out of the dry storage area. But even for such minor, routine expenses, the president either refused to spend the money or stalled.

BETWEEN A ROCK AND A HARD PLACE

I felt caught in the middle. I respected and liked the USDA inspector. He was fair, and he was the only one who had given me any training how to perform my quality control inspection duties. I tried to follow through with the company president to carry out his promises to the inspector. But the company president always acted irritated when I pressed an issue, and irritation seemed to be his general view towards QC.

He had an even lower opinion of the federal inspection system. When I reminded him of his commitments to the USDA inspector, he reacted with comments such as "Piss on the USDA." He made it clear that the plant was his property, not USDA's, and that he could do as he pleased. More than once he reminded me that it was his name on the bottom of my paycheck, and not to forget it. I knew that sooner or later I might have to make a choice between my paycheck and my values.

GETTING FIRED FOR DEFENDING THE LAW

It happened in January 1987. For two to three weeks no hams had been cured and sent to processing, and we were only about halfway through the drying cycle before the curing would be complete. Normally this is a slow period and employees work reduced shifts. This time, however, the president was anxious and wanted to start sending out processed hams right away. Around 3,000 pounds of ham were ordered to be removed from curing, and processed.

I knew this was illegal and a violation of the company's own USDA-approved procedures. I also knew I'd feel guilty if I let the hams be processed in that condition. Someone could have been hurt, because taking shortcuts on curing increases the chances of spoilage. This meat wasn't close to being finished curing. What bothered me most was that consumers may well have been unable to tell until they ate the ham and got sick. The warning signs from spoilage don't become obvious until it is more extreme. In other words, the public was going to get blindsided.

Besides being dangerous, undercured ham also is a ripoff. It means that consumers will be paying for ham but getting water instead -- I'd estimate around 5% more than the legal limits.

I told the company president about my concerns. He said he knew the hams were not ready but he was going to run them anyway. He warned me not to say anything to anyone.

I couldn't do that. That same day, a Friday, I reported the planned violation to the USDA inspector. He succeeded in frustrating the owner's scheme by putting a retain tag on the door of the drying room so that the meat couldn't be removed early.

I had a quiet weekend and arrived at work on Monday morning ahead of the other workers, to begin my preoperational sanitation duties. I was fired on the spot. The company president, a processing superintendent and a truck driver were standing there waiting for me. The company president walked right over and said the truck driver said some spoiled ham was going out. This was the same ham I had warned the president about three days earlier. The president then added, "I'm going to have to let you go, Don." I was shocked and asked, "What are you talking about?" He made it pretty clear with his answer: "We don't need you around here. You're fired. Now go on and get out." The truck driver and production manager didn't say anything.

Out of the corner of my eye, I saw the USDA inspector arriving and going toward his office behind the plant. I decided to leave and tell him what happened. He too seemed shocked and upset, and said he would see what he could do. We walked toward the entrance together, but the processing superintendent came out to stop us. He warned, "The best thing you can do is forget about it and get on out of here." I asked if I could at least get my calculator from my locker. He said no, it would be with my paycheck on Friday. There was nothing the USDA man could do.

There was nothing I could do, either. I had no rights and was on the plant owner's private property. I left angrily and was in a rage for several weeks. But that didn't change anything. There was nothing I could do.

By the time the USDA inspector and I went back, the rest of the plant employees were arriving at work and everyone knew what had happened. They all got the message, too. Many said they thought what happened to me was wrong, but many also said I should have known better. Since I left, to my knowledge no one else has repeated my mistake of sticking his neck out. There no longer is a QC supervisor, either. The three production supervisors now split that duty.

If the whistleblower bill had been the law in 1987, I believe things would have turned out different. The excuse to fire me over the spoiled hams was a sham. Most obviously, I was fired for the same hams that I had told the company owner could not be processed. Further, nearly everyone who worked at the plant saw the hams, but only I was fired. The company owner didn't even bother to go through the motions of a kangaroo court, by explaining what I had done wrong or getting my side of the story. Finally, no one had ever been fired before for off-condition hams going out. I am confident that with testimony from the USDA inspector I would have won if I had any rights. As it was, the company's excuse wasn't worth taking seriously but I was helpless.

For nearly a year I worked at other jobs, including a hosiery plant. I was lucky to be unmarried and to find work at all, but it still cost several thousand dollars in salary. A little over a year ago I was hired by USDA as a slaughter inspector.

WORKING FOR USDA: THE OTHER SIDE OF THE FENCE

Currently I am assigned at one of the better poultry plants in the industry. Even here, however, employees know better than to challenge profits and do not dare to cooperate with me openly. As one of my colleagues told me, the way it's set up, QC is a joke. Anyone who sticks his neck out will get fired.

It would be great to get their cooperation, because even at a good plant we know the company could do better. The difference between company and USDA public health standards is like night and day. As another USDA staffer pointed out, it's funny how company QC does processing checks and consistently does not find any problems. But USDA inspectors come behind and consistently find tumors, fecal contamination, busted gall, hairs, feathers and bruises. The USDA inspectors find diseases like air sacculitus, in which yellowish tissue and pus is inside the body cavity; and inflammatory process, identified by its hard surface of infected tissue between the muscles and skin. USDA keeps finding cadavers the QC staff somehow missed. That is strange, since the cadavers are red from all the internal blood released when live birds improperly were put in the scalder and drowned. It seems like under the current system, even at a good plant the QC staff cannot admit the obvious if it costs the company money.

There is no doubt about what I have learned from my experiences on both sides of the fence. Private workers aren't going to stick their necks out if they can't defend themselves. I don't know if I would stop those 3,000 pounds of undercured hams again. The first time I tried to do the right thing without any rights, and I got my head chopped off. If the whistleblower protection law gets passed, maybe employees can do the right thing and keep their heads. That is why I am testifying today.

Senator **Metzenbaum**. Mr. Henley, thank you very much. You have got courage, and you have got guts, and you tell a very discouraging story, both with respect to the treatment of employees in meatpacking plants and, frankly, some question as to whether the USDA does all that it should be doing.

My staff has contacted Department of Agriculture personnel, who confirm that nearly 3,000 pounds of ham were retained because of your report. The Government inspector also indicated that the violation would not have been uncovered without your cooperation.

Was it your sense that if you had remained quiet, your employer intended to ship this inadequately cured ham to consumers?

Mr. **Henley**. Yes, sir. There is no doubt in my mind it would have been shipped out.

Senator **Metzenbaum**. Why did you report the violation to the Government inspector?

Mr. **Henley**. More or less, I started having a guilty conscience about it.

Senator **Metzenbaum**. Did the Government inspector give you much cooperation? Did I hear you say that he said, "Keep your mouth shut"?

Mr. **Henley**. No. He knew what was going on, and he gave me full support of what I did.

Senator **Metzenbaum**. So he gave you full support.

Mr. **Henley**. Yes, sir.

It was the company president and the plant supervisor who told me to get out and don't say anything to anyone.

Senator **Metzenbaum**. I see. Do you feel that the U.S. Department of Agriculture makes a sincere effort to achieve the objective for which they are in position?

Mr. **Henley**. Yes, sir, I think so.

Senator **Metzenbaum**. Do workers feel comfortable discussing health and safety problems with Government inspectors?

Mr. **Henley**. Generally speaking, no, not from what I can tell in my experiences.

Senator **Metzenbaum**. Would you advise workers presently on the job in meatpacking plants to blow the whistle on their employers in view of the fact that they do not have any special protection under the law?

Mr. **Henley**. Not if they want to keep their jobs, I would not advise it, because they are in danger of losing their jobs if they do.

Senator **Metzenbaum**. You three men have a lot of courage. I sometimes wonder how you get the courage to do what you have done. I want to thank you for appearing today.

We searched the Nation to find witnesses for this hearing, and time and again, workers who are aware of safety or health violations refused to testify because they feared retaliation.

We offered to protect those witnesses. We offered to have the witnesses appear behind screens or in disguises so as not to be identified. But there was a palpable fear that because there is no current protection from retaliation, testifying would be too dangerous.

You have come forward. You can be proud because you are willing to do the right thing in the face of great pressures to do nothing. You are true heroes, and you are the reasons we need to enact this legislation as soon as possible.

I might say that you, Mr. Simpkin, had the courage to testify certainly before one of the most powerful committees in the Congress, chaired by a very powerful member of the Congress—but even with all of that, we were not able in Congress to protect your position. I believe no stronger case can possibly be made for the need for this legislation. I only regret the fact that 99 other Members of the Senate and 435 Members of the House could not have been here to hear your testimony today. It certainly is a testimonial to the courage that you have had and still have. I think those of us in Government owe you some apology for not having enacted legislation earlier to protect people such as you.

Thank you very much.

There will be a 2-minute recess.

[Short recess.]

Senator **METZENBAUM**. The hearing will come to order.

Our last two witnesses are Carol Tucker Foreman, partner, Foreman & Heidepriem, and former Assistant Secretary of Agriculture; and Thomas Devine, Legal Director of the Government Accountability Project.

We are happy to have you with us. Please proceed, Ms. Foreman.

STATEMENT OF CAROL TUCKER FOREMAN, PARTNER, FOREMAN & HEIDEPRIEM, AND FORMER ASSISTANT SECRETARY OF AGRICULTURE, WASHINGTON, DC.; AND THOMAS DEVINE, LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT, WASHINGTON, DC.

Ms. **FOREMAN**. Thank you, Mr. Chairman.

I am, as you noted, Carol Tucker Foreman. I served as Assistant Secretary of Agriculture from 1977 to 1981. In that position, I had responsibility for the Nation's meat and poultry inspection system.

I am here today representing a coalition of consumer and labor groups that are concerned that changes that USDA is proposing to make in meat and poultry inspection may increase the risk that contaminated meat and poultry will reach the public and increase the incidence of food-borne illness.

The coalition members include: Consumer Federation of America; Consumers Union; Public Voice for Food and Health Policy; Public Citizen; the National Consumers League; the Government Accountability Project; the AFL–CIO, and the United Food & Commercial Workers Union.

The Department of Agriculture has proposed major changes in both slaughter and processing inspection. These changes will reduce the presence of Federal inspectors and reassign many of their functions to plant employees.

We believe that the passage of the Employee Health and Safety Whistleblower Protection Act is just one of several important changes that must be made in Federal law and regulation before meat inspection changes go into effect.

S. 436 will extend to meat and poultry plant employees the whistleblower protections that are now available to Federal employees.

For over 20 years, the safety and wholesomeness of meat has been protected by dedicated Federal inspectors sworn to uphold Federal law and protect the public. They were present in slaughter plants at all times and visited every processing plant at least once each day.

Now the Department of Agriculture proposes to turn over to plant employees responsibility for many of the functions previously carried out by those Federal inspectors. In cattle slaughter, for example, plant employees will in the future be responsible for such activities as removing hair, feces and abscesses from dead animals. With regard to meat processing, inspectors may visit plants as rarely as once a month. This means that every day, the plant will be performing such functions as grinding pork and beef, cutting up fresh poultry, making fresh sausage—all without a Federal inspection presence.

Senator **METZENBAUM**. I do not understand the Department of Agriculture's position. Talk about putting the fox in the chicken coop. How do you expect an employee of a corporation to be able to call the shot on his or her own company? I recognize the value of the Whistleblower Act, but I am aghast to learn that the Department of Agriculture is proposing this change. How far along is the proposed change, and what has your coalition done to do something about it?

Ms. **FOREMAN**. Thank you for asking.

We have asked the Department—as has, incidentally, the American Meat Institute, the largest trade association in the meat industry—to withdraw the processing regulations, because frankly, the meat industry finds that there is a threat to them and their profitability from a public perception that meat and poultry will not be clean anymore.

We share their fear. We think it is a very serious problem and a real possibility. We would love to have the support of as many Members of Congress as possible in urging USDA to withdraw some really very bad proposed regulations, and start all over again.

Senator **METZENBAUM**. Have you discussed this with Senator Leahy, and the chairman of the Agriculture Committee in the House?

Ms. **FOREMAN**. Senator Leahy has written to the Department, urging them to withdraw both of these sets of proposed regulations. The House has been less sympathetic to our position.

Senator **METZENBAUM**. I would be happy to join in a letter with a group of other Senators on this subject. I am just flabbergasted. I heard that previous testimony and said to myself, "Maybe I ought to become a vegetarian." Now you come along and tell me this, and I think the American Meat Institute is right on target when they indicate a concern that people will turn off their willingness to ingest meats that have not been properly inspected.

So I would say to you that if Senator Leahy or others are prepared to send a joint letter where a number of us join in signing it, I would be very willing to participate.

Ms. **FOREMAN**. Thank you very much, Senator. We will be back to you about that.

We have a lot of concerns about those new proposals. Because of the testimony earlier this morning, you have a pretty good indication of what some of them are. First of all, they are being proposed at a time when food-borne illness is increasing. There are about 40,000 reported cases a year and perhaps as many as 2 million actual cases.

The public tends to think of salmonellosis as a belly-ache, but in fact, it is a very serious disease, and for the very young and very old, a life-threatening disease.

The incidence of the illness is occurring most frequently these days, or is increasing most, among those people over the age of 80. Obviously, in elderly people, it is a very serious, life-threatening illness.

I would point out to you that the American Association of Retired Persons has also joined in calling for the withdrawal of the regulations.

It is clear from your testimony earlier today that some meat and poultry plants put profit above public safety. Even with inspectors in the plant every day, as they are now, there are problems. The Wall Street Journal reported in a lengthy article on February 2 about a number of examples of filth in meatpacking plants. They pointed out that in several plants in New Jersey and New York, carcasses covered with hair, dirt, fecal material, were packaged and ready to be shipped. They reported on a conveyor belt moving exposed product in a ConAgra plant in California; the conveyor belt was covered with a thick, brown, greasy scum. They reported on a case of bloody diarrhea that hit a number of junior high school students in Minnesota that was traced back to incorrectly cooked, prebroiled beef patties, that were then served to the children in a school lunchroom.

There is in addition a long history of difficult relationships between plant management and inspectors, including incidents where plant employees chase inspectors, threaten their lives, and have physically abused them.

Fourth, there is a history of violence and lawlessness in the industry itself. Just last year, two major meat plants were fined by OSHA for maintaining a set of false records on the incidence of employee injuries in their plants.

The proposed USDA system is similar to, but not as strong as, the OSHA system. If meat and poultry plant employees decide to falsify records on meat and poultry inspection, the meat will have been sold and eaten, and the first that you will know that there is a problem is when people come up sick from it.

Under the new system, plant employees take the place of Federal inspectors. They become the primary protectors of human health. They will be the people who will be responsible for making sure that feces and filth have been removed, that fat levels in sausage are not too high, and that the ovens cooked the meat to an adequate temperature.

There is no reason to go forward with this process to reduce the Federal presence without at the same time increasing industry accountability. And today, there is a serious gap in that accountability.

A Federal inspector who reports bad meat or dirty conditions is protected under the law. A plant employee who reports on the existence of conditions that are a threat to his or her own health is protected by the law. But a plant employee who tries to stop a plant from shipping filthy meat out to the public is not protected by any law; he can be fired immediately. That is just not acceptable, whether there is an inspector in the plant all the time, or whether the USDA goes ahead with its new system.

I am concerned about fair play for the workers, but my greatest concern and my reason for being here today is that we have got to have a higher level of safety for the public. The purity of the meat and poultry supply is going to be put in the hands of plant employees. Our health and safety will depend on them. They must be charged to protect the public.

It is unreasonable to expect employees to act to protect the public if it means that they are going to be fired for doing so. It happened three times—you saw these guys this morning—but you cannot expect it to happen day in and day out, in thousands of companies all across the country.

Plant employees have to be able to act responsibly without fear of harassment or termination. S. 436 will provide some basic level of protection to plant employees who take their responsibilities seriously, and it may be an important measure of safety for the consuming public as well.

The groups that I am here representing today are very pleased to be able to actively support S. 436, and we will give you whatever assistance we can in trying to move it through the Congress.

Thank you, Mr. Chairman.

Senator **Metzenbaum**. Thank you very much.

[The prepared statement of Ms. Foreman follows:]

TESTIMONY OF CAROL TUCKER FOREMAN,
FORMER ASSISTANT SECRETARY OF AGRICULTURE
FOR FOOD AND CONSUMER SERVICES
BEFORE THE SUBCOMMITTEE ON LABOR
OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
MARCH 7, 1989

Mr. Chairman, I am Carol Tucker Foreman, a partner in Foreman & Heidepriem, a Washington, D.C. public affairs firm. From 1977-81, I served as Assistant Secretary of Agriculture for Food and Consumer Services. In this position I had responsibility for the nation's meat and poultry inspection system.

I am here today representing a coalition of consumer and labor organizations[1] formed to monitor changes the U.S. Department of Agriculture is proposing in the meat and poultry inspection system. These changes may increase the risk that contaminated meat & poultry will reach the public and cause a dramatic rise in the incidence of food-borne illness.

The USDA has proposed changes in both the slaughter and processing phases of the meat and poultry inspection system that will reduce the presence of federal inspectors and reassign many of their functions to corporate employees. We believe that passage of the Employee Health and Safety Whistleblower Protection Act is one of several important changes that must be made in federal law and regulation before these changes in inspection are implemented in order to protect the public, S. 436 will extend whistleblower protections that now cover federal employees to corporate employees who report on unlawful or dangerous activities that threaten the public health and safety.

---

[1]. The coalition includes the following organizations: Consumer Federation of America; Consumers Union; Government Accountability Project; National Consumers League; Public Citizen; Public Voice for Food and Health Policy; AFL-CIO; American Federation of Government Employees; Food and Allied Service Trades Department, AFL-CIO; and United Food and Commercial Workers International Union.

For over twenty years, the safety and wholesomeness of meat and poultry which carry the USDA inspection label have been assured by dedicated federal food inspectors, sworn to uphold the laws designed to protect the consuming public. These inspectors are present at all times in plants that slaughter animals, and they visit every processing plant at least once a day to ensure compliance with the law. However, resource cutbacks and steadily decreasing management support in the last eight years, have made their jobs drastically more difficult.

The Department now contemplates major changes in the basic nature of the meat and poultry inspection system. Proposed regulations covering inspection of slaughtered cattle would make plant employees responsible for removing so-called "dressing defects" and "trimmable errors" rather than having this function performed by federal inspectors. "Dressing defects" and "trimmable errors" are technical words for ingesta, hair, oil, grease, feces, abscesses and fractures.

In 1986 Congress gave the USDA permission to end daily visits by plant inspectors to meat and poultry processing plants and to transfer to corporate employees substantial responsibility for public health protection. Under the Processed Products Improvement Act (PPIA), P.L. 99-641, USDA is not required to have a federal inspector visit every processing plant at least daily.

USDA's proposed regulations to carry out this law may result in inspectors visiting a plant no more than once a month. Many of these plants are involved in operations that are highly susceptible to contamination that leads to food-borne illness. The new inspection program covers such contaminable functions as cutting up fresh poultry, grinding beef and pork, formulating fresh sausage, and precooking beef patties and rare roast beef. It also covers nearly all meat and poultry sold by fast food franchises, as well as TV dinners, and airline meals. Each of these products or processes has been associated with substantial bacterial contamination and/or linked to serious outbreaks of food-borne disease.

Our coalition believes that the proposed new inspection procedures raise several serious concerns:

First, the new system of inspection is being proposed at a time when the incidence and impact of food-borne illnesses are increasing. Meat and poultry were implicated in 1,400 of the 2,666 food-borne disease outbreaks reported to the Centers for Disease Control from 1968 to 1977 for which a food source was determined.

Reported salmonellosis cases doubled in the last 16 years to about 40,000 per year, with more than half of the outbreaks reported to the Centers for Disease Control traced to meat and poultry. Public health officials believe there may be as many as two million cases of salmonellosis per year. In addition, meat and poultry are a major source of campylabacteriosis an red meat products have been found to be contaminated with listeria.

Food-borne illnesses are serious. Salmonellosis is thought to be responsible for 2,000 deaths per year, 500,000 hospitalizations and for hundreds of millions of dollars of health care and other costs. Food-borne diseases are especially dangerous, even life threatening, to the very young, the very old, the infirm and those with immune system deficiencies. Salmonellosis is increasing rapidly among those over the age of 80, the fastest growing segment of our population.

Other food-borne diseases such as campylobacteriosis and listeriosis are on the rise and impose substantial health risks and economic burdens on the public. As long as food-borne illness is increasing and as long as it continues to be a major public health problem, the government's first priority should be to improve public health protection.

Second, there is reason to believe the new slaughter and processing systems will lead to an even greater increase in food-borne illness due to the shift of responsibility from a well trained federal inspection force to plant owners and operators whose first goal must be to generate a profit. USDA records note, and the media regularly report on conditions of extreme filth in meat and poultry plants. The lack of sanitation may lead to human illness. For example, on February 2, 1989, the The Wall Street Journal carried a lengthy article which included the following examples of filth in meat and poultry packing operations:

--"In northern New Jersey and New York last year, 23 out of 33 plants inspected were caught mishandling meat. At one plant, inspectors found 'virtually all veal and lamb carcasses that had passed the clean-meat station were contaminated with heavy amounts of hair, dirt and fecal material.'"

--"Last spring, inspectors found 'serious sanitation and rodent problems' at a large ConAgra, Inc. plant in Dixon, Calif. A thick, brown, greasy scum was observed on the rollers of a conveyor belt conveying exposed products...Vacuum-packed lamb primal cuts, ready for shipment, were contaminated with grease, fecal material and wool."

--At a small New York poultry plant two years ago, employees were preparing to spray 'liquid smoke' on moldy turkey wings to mask the rancid taste.

--The Minnesota Department of Health blames an outbreak of serious intestinal illness among thirty junior high school students last October to bacteria in pre-broiled hamburgers that were reheated and served in the school cafeteria.

--In Cleveland, an inspector discovered a huge tub of turkey meat full of metal shavings. A defective meat tenderizer had sprinkled the meat with shards of aluminum. The quality control supervisor had already cleared the product. The inspector tagged 33,000 pounds of meat and the plant condemned half of it.

Third, there is a long history of stressed relationships between meat and poultry producers and federal meat inspectors. The Government Accountability Project has examined these instances in detail and reported on them.

Fourth, the history of the meat and poultry industry is replete with violence and lawlessness. Although most meat and poultry processors are honest business people, devoted to providing clean, wholesome products, there is a need for constant vigilance. Just last year, two major meat packers were assessed large fines by the Occupational Safety and Health Administration. The companies created and maintained two separate sets of records on the incidence of injuries in their plants. They submitted false records to OSHA in order to avoid more frequent scrutiny by Department of Labor inspectors.

This history raises great concern as USDA attempts to shift to a system similar to, but weaker than, the OSHA's. There are problems in many plants despite the fact that USDA inspectors are there every day. We must wonder how many times these problems will multiply when federal inspectors visit only occasionally and what the resulting impact will be on public health. We do know that if meat and poultry plant officials cheat or falsify records, much of the tainted product will have been sold and eaten before USDA discovers the problem.

As the Department shifts from a system in which an inspector is in each plant every day to a system of periodic inspection, plant employees will be responsible for carrying out safety and health inspections. Plant employees will be responsible for:

--removing feces and other filth,

--testing water and fat levels in sausage,

--checking oven time and temperature on rare roast beefs and beef patties highly susceptible to salmonella contamination.

Both the Congress and the public must understand that reducing federal inspection coverage without increasing industry accountability can have a major negative impact on public health and safety. This potential threat makes S. 436 much more significant than merely guaranteeing fair play for workers.

There will be no federal inspector in processing plants to protect the public interest. The purity of the meat supply will rest on the shoulders of plant employees. The public will be largely dependent upon them. They must be able to carry out there responsibilities free from threat of harassment and employment termination.

This creates terrible pressure. It is difficult for an employee who knows he or she will be fired for reporting a hazardous situation, but who also knows public health protection requires action. We owe them and ourselves adequate protection.

S. 436 is crucial to public health protection as the meat inspection system moves from dependence on federal employees to a system based on plant employees. Federal employees have whistleblower protections. These must be extended to plant employees who blow the whistle on unlawful or dangerous activities that threaten the public health or safety. S. 436 also: creates a uniform 180-day statute of limitations so employees can have time to file a complaint if they have been harassed or discharged for acting to protect the public;
grants subpoena power to the Secretary of Labor to ensure effective investigation of complaints; and ensures that the health and safety complaint is referred to the appropriate government agency for investigation and action. These are the most basic sort of protections we owe to those who act on our behalf.

Mr. Chairman, our coalition does not oppose action to secure more efficient and effective use of federal inspection resources. We think the present meat and poultry inspection system would benefit from change and modernization. However, we want and have not seen a commitment from USDA to public health protection. In fact, the trends of this decade have steadily eroded the base for consumer confidence in safety of food in spite of the USDA seal of approval.

As the Department moves to streamline its system, it is imperative that it structure and introduce it in a way that does not diminish either public health protection or the public's perception of the level of protection. Whistleblower protection for meat and poultry plant employees is essential to this new system and must be secured before it is instituted.

Senator METZENBAUM. We are very happy to have you with us, Mr. Devine. I would like to ask you—time is running out on us—your entire written statement will be included in the record, but if you could please conclude in a relatively modest amount of time, we would appreciate it.

Mr. DEVINE. Thank you, Mr. Chairman.

If approved, S. 436 will represent a breakthrough for the law of dissent for corporate employees. This bill goes beyond basic fairness, it is essential for sound public policy.

I think the lesson from this hearing should be clear. We cannot depend on corporate workers to defend the public if those workers cannot defend themselves. Profiles in courage are the exception; they are not the rule.

Perhaps if this legislation already were in effect, we might have learned about some of the fiascos discussed today before they became tragedies.

In particular, our experience has exposed us to meat and poultry industry practices, where 42 whistleblowers have told the same story that Mr. Henley shared with you this morning. I would like to emphasize that his experience is the rule, not the exception.

The whistleblowers consistently have described instances such as failing to flush fecal contamination out of hog intestines before using them as natural casings for our sausages; packaging roast beef while it is still hot, which makes it a salmonella breeding ground; glass from broken whiskey bottles mixed in with the meat when a plant manager ordered employees to just pick out the glass without stopping the line; or even rat manure in pork shoulders that companies attempted to disguise by putting them in pickle brine.

Employees who challenge these practices by "committing the truth" were treated like they had committed a crime. They faced certain harassment, including practices such as demotion from supervisor to janitor; refusing to grant permission to go to the bathroom, which on occasion explains sewage on the floors where products fell and were picked up; and being fired on the spot, as Mr. Henley.

Federal inspectors rely on corporate workers as their eyes and ears. But plant employees can only help in secret, after they know and trust and inspector not to turn them in.

Senator, it has reached the point where they cannot come out of the closet about being honest.

Thank goodness the sanitation violations discussed above were caught by Federal inspectors. They are on the job under the current system, and the products were condemned. But without corporate whistleblower rights under the USDA's new plan, the public can expect to eat that contaminated food.

I would like to make a post script Ms. Foreman's statement—the USDA has declined to withdraw this proposal, although 99 percent of the public comments have been opposed to it. Instead it has been presenting this plan for an "honor system" as the way to strengthen meat and poultry inspection.

I think the meat and poultry inspection chief at the agency is adopting the role of the Joe Isuzu of the Federal bureaucracy.

Senator **Metzenbaum**. If the Department of Agriculture refuses to withdraw the regulations, why don't we pass a law requiring them to do so?

Mr. **Devine**. Senator, that is music to my ears. We would be glad to cooperate with your committee on trying to tighten up the laws. Their discretion to take this initiative was originally approved by Congress as a way to strengthen meat and poultry inspection, and they are saying this is the way they are doing it.

Senator **Metzenbaum**. Well, what is the problem in the House? Why is the House not supportive of undoing this regulation?

Mr. **Devine**. Well, I don't want to generalize about the viewpoints in the House. The Agriculture Committee has supported the agency's plans on this, to our knowledge. We are hoping that they are open-minded and flexible. Some of the other House leaders have been very concerned that instead of strengthening protection, we are weakening it, by getting Federal inspectors out of the way.

Senator **Metzenbaum**. What is the rationale for the Department of Agriculture?

Mr. **Devine**. Well, the Department of Agriculture claims that they are trying to conserve their budget by reducing the number of inspectors and prioritizing them more strategically to focus on the problem plants.

Unfortunately, they have selected some of the worst problem plants in the industry for this honor system under the initial abuses. It is making guinea pigs out of the consumers for a plan of total deregulation.

Unfortunately, although they have said in their rhetoric that they want to crack down on the problem plants, the actual plan for discretionary inspection, as this is called, does not contain provisions to crack down more than those plants would have under the status quo.

So we know that nothing will get better, but almost certainly at many plants, the Federal Government is simply going to get out of the way.

We think this is a public relations approach to Federal inspection, not a public health approach.

Ms. **Foreman**. Could I just point out one other thing there. When they announced this plan, the head of the meat inspection office stated that it would allow the department to cut the number of processing inspectors in half and reduce the budget by about half as well. So I think it is really quite clear what their intention is.

Senator **Metzenbaum**. How big is the budget?

Ms. **Foreman**. The total budget for the agency——

Senator **Metzenbaum**. For inspectors.

Ms. **Foreman** [continuing]. For the inspectors is about $400 million a year.

Senator **Metzenbaum**. So they would save $200 million.

Ms. **Foreman**. They would save less than that, because this is just the processing inspectors, Senator, and I am not sure exactly what the figure is there. They are the largest number of inspectors.

Senator **Metzenbaum**. When will the proposed regulations making this shift—both in time, the number of inspections by Government inspectors, as well as turning over the responsibility to the corporate employees–when will that take place?

Ms. **Foreman**. The comment period on the proposed regulations closed February 2. We have urged that they withdraw them. We hope they do not take effect.

Senator **Metzenbaum**. When did you say it would go into effect?

Ms. **Foreman**. The comment period closed February 2. They are now reviewing those comments, but all of their public references since then have indicated they intend to go ahead and put them into effect.

Senator **Metzenbaum**. For me to have to eat meat and fowl, or for any other American to be expected to do that in the interest of economy, frankly does not make this a "kinder, gentler Nation."

This is a hearing on whistleblowers, but you have just really shocked me when you have told me this. I guess maybe Members of Congress get most shocked when it comes home to them, and when you think about what may be ingested by yourself, your children, your grandchildren, it is most disturbing.

OSHA had an honor system approach in the early eighties, as you well know, and now that is being abandoned in light of the staggering violations that have occurred since 1986. I think this is horrible, and I would be glad to lend my weight to try and undo this before it becomes a reality. I think a piece of legislation might very well be an appropriate procedure. I am going to discuss this subject with Senator Leahy; he may be inclined to do so as well, he being the chairman of the Agriculture Committee.

Mr. Devine, could you wind up?

Mr. **Devine**. Yes, sir.

Unfortunately, in many instances, for meat and poultry inspection or radiation problems or air safety, workers simply cannot defend themselves against reprisal. They do not have any day in court. The general rule is that they proceed at their own risk if they attempt to defend the public. And even when they are covered, their rights frequently are canceled by unrealistic 30-day statutes of limitation. Most victims do not even know of the laws that quickly.

They are hampered by lack of corporate accountability during pre-trial discovery, leaving them with a minor league legal system for major league policy disputes.

More often than not, the Department of Labor fails to provide timely decisions, and we have enclosed a study of Department of Labor decisions as part of our written testimony.

Finally, the administrative and judicial precedents interpreting the current statutes have been drastically inconsistent. For example, in the *Simon* case, involving the husband of Betty Simon, who testified at last year's hearings, the whistleblower was permitted to be fired because his alleged dissent about heptachlor in the poultry feed would damage the company's reputation, without considering evidence from company laboratory tests that the feed in fact was contaminated. He was literally fired for telling the truth, Senator.

Contrary to long-established precedent, in that case, he was fired for speaking to a private citizen about problems, even though this was part of an assignment to assist the Government. The employer conceded that same disclosure would not have been grounds for firing if it had been made directly to the Government.

In the *Lockert* decision recently, the Secretary declined to overrule an ALJ's decision effectively discarding the *Mt. Healthy* doctrine. What this meant was that the Secretary upheld a firing despite a finding that the whistleblower was not guilty of the independent misconduct alleged. You only have to be accused of something else; you do not have to be guilty of it if you are a whistleblower.

Finally, in *Lockert*, the Secretary imposed prior restraint, holding that an employee must first seek supervisory approval before engaging in undisputedly protected conduct, or else he would forfeit the law's shield.

The current case law is unpredictable at best and increasingly repressive, at worst. We feel that S.436 offers solid solutions to all of these structural flaws.

We have offered certain recommendations so that the legislative text can match the legislative intent, but they should be put in perspective. As drafted, this bill represents a free speech and a public safety milestone. Our organization will remain at the disposal of your staff to help.

Senator **METZENBAUM**. We look forward to working with you, Mr. Devine, and with you, Ms. Foreman. We appreciate your testimony very much.

You have opened up a new vista to me having to do with this question in the Agriculture Department, and I would be happy to work with you in connection with that as well. So you have a two-for-one. You have me onboard on the agriculture issue, whereas we are glad to have you onboard with respect to this issue, and we will see if we can't move the whistleblower legislation forward promptly.

[The prepared statement of Mr. Devine and additional material supplied for the record follow:]

TESTIMONY OF THE GOVERNMENT ACCOUNTABILITY PROJECT
on the
EMPLOYEE HEALTH AND SAFETY WHISTLEBLOWER PROTECTION ACT

before the

Subcommittee on Labor,
Senate Committee on Labor and Human Resources

March 7, 1989

Government Accountability
Project
25 E Street, N.W.
Suite 700
Washington, D.C. 20001
(202)347-0460

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting the testimony of the Government Accountability Project (GAP) on S. 436, the Employee Health and Safety Whistleblower Protection Act. GAP is a non-profit, non-partisan organization that provides legal support and policy advocacy for whistleblowers, those employees who challenge illegal, dangerous, abusive or wasteful misconduct where they work. If approved, S. 436 will represent a breakthrough in the law of dissent for corporate employees. At least for those who defend the public on health and safety issues, this bill ends the "at will" doctrine, in which private workers can be fired at the employer's whim.

S. 436 is badly needed as a matter of justice. Today's witnesses demonstrate that many whistleblowers are legally helpless against reprisals. They don't have any chance to defend themselves under the law, let alone a fair chance.

The importance of this bill goes beyond matters of basic fairness and justice. It is essential for sound public policy. The lesson from this hearing should be clear. We cannot depend on corporate workers to defend the public, if those workers can't defend themselves. Profiles in Courage are the exception, not the rule.

Perhaps if this legislation already were in effect, we might have learned about the Challenger fiasco before it became a tragedy. Numerous air disasters may have been avoided. The Dalkon

Shield controversy might have been prevented, instead of resolved through endless litigation that can never make its victims whole. Perhaps the mind-boggling radioactive releases at the Fernald uranium enrichment facility would have stopped, instead of exposing the public to some 500,000 pounds of radioactive emissions.

GAP's experience representing whistleblowers has exposed us to a microcosm of the need for this legislation -- practices in the meat and poultry industry. Over the last year I have taken statements from 42 government and corporate meat and poultry whistleblowers. They all tell the same story. Too many members of the industry will ship into commerce any food they can sell, regardless of its condition. In affidavits or interview reports, they have described conditions such as --

* numerous instances of toilets overflowing with human waste tracked onto the production floor, where employees dropped food and obeyed orders to pick it back up for processing;

* plants attempting to start daily production despite preoperational conditions such as "accumulated putrid scraps of meat and dirty drains with rancid water smelling like a toilet that hasn't that hasn't been flushed for months";

* failing to flush the fecal contamination out of hog intestines before using them as natural casings for sausages;

* cooking utensils so heavily encrusted with cooked-on and scorched gravy that it couldn't be scraped off the inside edges with a knife;

* packaging roast beef while it is still hot, at 100 degrees F. instead of 50 degrees as required, which makes it a salmonella breeding ground;

* glass from broken whiskey bottles that was mixed in with the meat, at a plant where the manager ordered employees to just pick out glass without stopping the line;

* rat manure in pork shoulders that a company attempted to disguise by putting it in pickle brine;

* moldy turkey wings that a company attempted to disguise with liquid smoke; and

*chickens rinsed with fly spray instead of water.

Unfortunately, employees who challenged these practices by "committing the truth," even when challenging health hazards in private conversations with company supervisors, faced certain harassment, including practices such as --

* demotion from production supervisor to janitor;

* refusal to grant permission to go to the bathroom, which on occasion explained the sewage on the floors;

* reduction of ventilation where they worked in areas with high concentrations of chlorine or chemicals;

* disciplinary sanctions for seeing the doctor to seek diagnosis and treatment of tendinitis and corporal tunnel syndrome; and

*for those not so lucky, firing at will, on-the-spot, sometimes on ugly grounds intended to make an example of the whistleblowers, without any opportunity to confront their accusers or defend themselves.

If there were any doubt about the industry's intolerance for bad news, consider its treatment even of federal inspectors. They have reported harassment through tactics such as physical beatings; death threats; chasing an inspector into the USDA office, trying to kick in the door, yelling, cussing and generally keeping the inspector prisoner for a half hour; and letting the air out of tires.

Federal inspectors further report that they could not have found and condemned many of the gross sanitation violations discussed above without help from corporate workers whom they rely on as their eyes and ears. But they warn that plant employees are emphatic that they help only in secret, after they know and trust the inspector not to "turn them in" by revealing them as sources. Even then, the federal inspectors consistently report that they're only catching the tip of the iceberg, because employees are afraid.

If anything, the need for defenses against these type abuses is increasing. For example, the USDA plans to effectively deregulate meat processing inspection by replacing it with an honor system where company quality control (QC) employees would check the food and federal inspectors largely restrict themselves to reviewing paperwork. Thank goodness, the sanitation violations discussed above were caught by federal inspectors and the products condemned. Without corporate whistleblower rights, however, under the current deregulation trend the public can expect to eat that contaminated food.

Similarly, the last few years have seen unprecedented revelations of environmental hazards at nuclear weapons facilities. What has not been revealed is the indefensible consequences for those workers who internally challenged or publicly dissented against widespread radiation releases. For example, one whistleblower who sparked public debate on the Hanford, Washington plutonium facility began facing a stream of assignments that exposed him to excessive radiation. Workers at the Rocky Flats, Colorado facility faced the same fate after challenging the sloppy practices that have made the plant a clear and present danger to public health and safety. Even more chilling, the whistleblowers' supervisor warned them that their security clearances would be yanked with help from the Department of Energy.

General Electric employees at the Knolls Atomic Power Laboratory exposed a lack of radiation control so severe that an abandoned facility still "hot" was later sold and used as a grocery store food warehouse, and the pavement at a local parking lot was radioactive. In response, the company issued a gag order threatening loss of job for any unapproved disclosures and again invoking the threat of federal intervention to remove security clearances.

Unfortunately, in most instances workers cannot defend themselves against these reprisals under the current legal system. With the exception of piecemeal whistleblower provisions tucked into sixteen statutes, federal law provides no relief for private employees who dissent against public health and safety violations. Employees in the food, airlines, aerospace, pharmaceutical, medical, shipping and other industries proceed at their own risk if they attempt to defend the public.

Second, even when employees are covered, their rights frequently are cancelled by unrealistic thirty day statutes of limitation. In our experience, most reprisal victims do not even know of those laws before the 30 day period expires.

Third, even if they manage to file timely complaints, whistleblowers are hampered by the lack of corporate accountability during pre-trial discovery. With impunity, employers refuse to provide necessary information or even critical witnesses to be deposed. The result is a minor league legal system for cases involving major league public policy stakes.

Fourth, more often than not the Department of Labor fails to provide timely decisions within the current 90 day deadline in many of the piecemeal statutes. Indeed, GAP's Freedom of Information Act study of timeliness for Labor Department litigation in the 275 whistleblower cases between fiscal years 1982 and 1989 (through February 17) revealed that for 20% of the cases, the Department of Labor did not even meet the 240 day deadline within S. 436 before an employee can seek relief in federal court. The delays in numerous cases were around 800 days, and in one instance lasted 1001 days. For those employees, justice delayed literally was justice denied, if not indefinitely forgotten.

The problem of tardy decisions is getting worse. Although from 1982-84 over 90% of final decisions were reached within 240 days, for 1987-89 the rate fell to 70%, 61% and 58% respectively. A chart with our findings is enclosed.

Fifth, the administrative and judicial precedents interpreting the current statutes have been drastically inconsistent. At one end, decisions such as the Landers case have emphasized the public policy goals behind whistleblower protection and extended the shield even to erroneous disclosures on relevant topics unless the speech is "totally false, malicious or misleading." At the other extreme, an Administrative Law Judge's recommended decision in the pending Simon case -- involving the husband of Bette Simon from last year's hearings on this bill -- permitted the whistleblower to be fired because his alleged dissent against heptachlor in the poultry feed would damage the company's reputation, without considering evidence from a key company witness that a laboratory test revealed the feed in fact was contaminated.

Similarly, the Wedderspoon and Nunn cases are clear that dissent even to the media is covered, because an employer could infer the whistleblower was "about to" go to the government. At the other extreme, in the Simon case an employee dismissal was upheld for speech to a private citizen as part of an assignment from government agents whom the whistleblower was assisting. Ironically, the employer, Simmons Industries, Inc., conceded the same alleged disclosure could not have served as grounds for firing if it had been made directly to the government.

Recently in the Lockert decision the Secretary declined to overrule an Administrative Law Judge decision effectively discarding the Mt. Healthy doctrine that when reprisal is a factor the employer can only fire a whistleblower if it would have taken the same action on valid, independent grounds. In Lockert the Secretary upheld a recommended decision upholding discharge without disturbing the ALJ's finding that the employee was not guilty of the independent misconduct alleged. Finally, in Lockert the Secretary imposed prior restraint as a precondition for protected activity, holding that an employee must first seek supervisory approval before engaging in undisputedly protected activity or else forfeit the law's shield.

In short, the current case law is unpredictable at best, and increasingly repressive at worst. In part this is due to the turbulence in judicial precedents interpreting free speech protections under the First Amendment. Another reason is the lack of accountability to precedent for administrative law decisions. It also is due to the high stakes of whistleblower cases, and the intense political pressures on Administrative Law Judges who still have no true independence as do judges in the federal Article III courts. For whatever reason, however, the bottom line is chaos. Workers simply do not know what their rights are, even if they know they are covered by a whistleblower law.

Equally significant to all the other reasons combined is that ultimately the public loses, regardless of the litigation outcome. This is because the reason for reprisal -- disclosures of and challenges to alleged public health and safety threats -- gets lost in the shuffle. Unfortunately, in order to fight retaliation the whistleblower is overwhelmed by the struggle for self-preservation -- of career, family, finances and even sanity -- until the point of the dissent is forgotten or put behind weightier survival priorities. As a result, frequently the current legal structure at best directs systematic attention to helping the individual, while the public's interest is recognized only erratically through investigation of the whistleblower's charges.

S. 436 offers solid solutions to all the structural flaws described above. It replaces piecemeal protection with comprehensive free speech protection for health and safety dissent by those currently overlooked. It creates a more realistic six month statute of limitations. It restores accountability for pre-trial discovery in administrative law hearings by providing the Secretary of Labor with enforceable subpoena authority. It removes the Secretary of Labor's monopoly on cases that are stuck in the black hole of delay after 240 days. It replaces the administrative case law hodgepodge with realistic, consistent statutory legal burdens of proof. As a result, predictability, consistency and coherence may replace the chaos of current law. Finally, the bill assures that the point of the dissent will not be forgotten, by regularly triggering investigation of the public safety allegations underlying the reprisal complaint. In short, if approved this legislation will be the cornerstone for a modern law of dissent in the private labor force.

It would be unrealistic to expect any proposed statute to be a model solution. GAP offers the following recommendations so that the legislative text can achieve the legislative intent.

1. Apply the anti-reprisal protection to protect corporate whistleblowers against discrimination implemented through the federal government, when it has the power to affect the terms of conditions of employment. Retaliatory security clearance

investigations and denials illustrate reprisals where private employers frequently get the government to do their dirty work.

2. Apply the law to protect dissent against violations of all criminal statues, rather than those merely affecting health and safety. Although currently it is illegal to retaliate against a federal witness, there is no remedy for the witness. This bill is the appropriate vehicle to close that final loophole.

3. Protect dissent against occupational safety under the same procedures enjoyed for public dissent. Employees currently do not have control of their cases when they pursue their rights under occupational safety laws, and the Occupational Safety and Health Administration has championed their cause in less than 1% of complaints filed. It is time to emerge from the 19th Century involving health and safety threats within the workplace, if we expect those same employees to protect the public against similar dangers.

4. Create penalties for intentional violations of the statute that would have a significant, chilling effect on public policy. Otherwise, a company will have nothing to lose by violating this law. At most, the employer will not get away with it. The vacuum of penalties means of a vacuum of deterrence.

5. Create consistent access to federal court for existing causes of action as well as those created by this bill, when the DOL fails to issue a timely decision. The escape route to federal court for newly-covered employees in this bill is based on the tardiness of current statutes. If S. 436 passes, the caseload will be greater due to new causes of action. But employees under the old laws will be just as helpless against untimely decisions as before. Ironically, the rights for new workers could exacerbate the plight of those covered under the pioneer whistleblower statutes by causing even longer waits.

6. The same recommendation applies to legal burdens of proof. Under this bill the carryover whistleblower laws will continue to be evaluated under the old body of inconsistent administrative precedents. But the newly-created causes of action under S. 436 will be evaluated by legal burdens of proof clearly specified in the statute. The new law should promote consistency, not further contradictions.

7. The legislative history should emphasize that Congress intends "prominent" posting of workers' rights under this law, consistent with the notices required under last year's polygraph statute. One major reason whistleblowers have been unaware of their rights under current law is that employers post the notices through reduced xerox copies at one bulletin board in the corporation, underneath other announcements.

8. The legislative history should specify that Congress intends a forum non conveniens principle to apply to litigation under this statute. On occasion the Department of Labor has made it financially impractical for complainants to pursue hearings by scheduling them at remote locations.

9. The last recommendation is a foundation for all the rest. The legislative history should clearly specify that there are no unstated loopholes in the scope of protected conduct, such as an employee's audience, motives or willingness to engage in prior restraint. The most nonproductive litigation under the current statutes has involved intricate challenges to the scope of protected dissent that are irrelevant to the public policy goals of whistleblower protection. The employee should not be put on trial in a reprisal case, except to determine whether allegedly protected speech is irrelevant for public policy or whether legitimate independent grounds existed for the alleged reprisal.

These recommendations should be put in perspective. While we at GAP believe S. 436 can be improved, even as drafted it represents a free speech and public safety milestone. We enthusiastically applaud the bi-partisan leadership behind this bill, and we will remain at the disposal of your committee staff if we can help further.

41404

Department of Labor Whistleblower Cases Completed

Within 240 Days: 1982-88

Fiscal Year	Timely	Untimely	Percent Timely	Percent Untimely
1982	9	1	90%	10%
1983	15	1	94%	6%
1984	21	2	91%	9%
1985	32	9	78%	22%
1986	41	3	93%	7%
1987	37	16	70%	30%
1988	39	25	61%	39%
1989*	14	10	58%	42%
TOTAL:	208	67	80%	20%

* Through 2/17/89

FEDERAL PROTECTION OF PRIVATE SECTOR HEALTH AND SAFETY WHISTLEBLOWERS

A Report to the
Administrative Conference of the United States

by

Eugene R. Fidell

Partner
Klores, Feldesman & Tucker
2001 L Street, N.W., Suite 300
Washington, D.C. 20036

This Report was prepared for the Committee on Adjudication, Administrative Conference of the United States. Opinions expressed in this Report are those of the author alone, and should not be construed as representing the views of the Administrative Conference or any other agency of the Government.

February 1987

Table of Contents

Introduction and Summary 1

Taxonomy and Terminology 5

The Common Law Context 7

The Federal Response 8

1. Public Sector Employees 8
2. Private Sector Employees 9
3. "Twilight Zone" Cases 10
4. Caseload 10

Shortcomings of the Current Arrangements 13

1. Jurisdictional Lacunae 13
2. Protected Conduct 16
3. Limitation of Actions 19
4. Investigative Arrangements 20
5. Adjudicatory Procedures 26
6. Remedies.................................. 31
7. Judicial Review.................................. 33
8. Interaction with Program Agencies 34
9. Access to Law and Interagency Doctrinal Growth 35

Relation to Prior Conference Recommendations 37

Conclusions and Recommendations 40

1. Matters within the Purview of the Administrative Conference 40
2. Matters not within the Purview of the Administrative Conference 42

Tables:

1. Private Sector Employee Protection Statutes (Health and Safety) A1

2. Public Sector Employee Protection Statutes (Health and Safety) A2

3. Protected Conduct A2

4. Protected Conduct: Protected Disclosures A4

5. Exhaustion of Employer Remedies A5

6. Remedies A6

7. Caseload, FY 1985 .... A7

8. Whistleblower Case Chart A8

9. Citations to Statutes and Regulations................ A17

10. Abbreviations A18

Introduction and Summary[1]

Few areas of federal labor law are currently the subject of as wide public interest as "whistleblowing", a now familiar term for the dissemination by an employee of information critical of or reflecting adversely on an employer, typically for the purpose of correcting or preventing some violation of law or other harm to the public interest.[2] The most widely publicized recent episode--involving two engineers employed by Morton Thiokol Inc., a major National Aeronautics and Space Administration contractor for the ill-fated Challenger space shuttle--is only one in a growing series of incidents in which employees have alleged that they were retaliated against for whistleblowing in matters affecting health or safety.

Over a dozen federal laws attempt to protect whistleblowers from retaliation in wide areas of private sector activity where health and safety are at stake.[3] These laws which protect both public and workplace health and safety interests, omit large and potentially important industries such as aviation and pharmaceuticals. In addition, they have created a crazy quilt of investigative, adjudicatory and review responsibilities. These are summarized in Table 1 below. There appears to be increasing Congressional interest in protecting yet other categories of whistleblowing.[4]

While a body of literature has developed concerning whistleblowing (and the promise of more to come), it is only now being recognized that these statutes form part of a larger whole. Until now, with a few notable exceptions,[5] little effort has been made to render a rational account of Congress' activity in this area and those who have become involved under one or another of the statutes have tended not to become involved in the others. Federal whistleblowing protection has probably been seen more as an appendage to the underlying substantive regulatory program, than as a focus for legal analysis in its own right or as a new subspecialty within the field of labor law. One of the purposes of this report is to suggest a different perspective: viz., that the varieties of legislative and administrative experience under the federal health and safety whistleblower protection provisions, taken as a whole, represent a "sea change" in labor law that merits study and legislative attention in its own right.

As Table 1 shows, under eight of the federal whistleblowing statutes, the Secretary of Labor has assigned investigative responsibility to the Wage and Hour Division, under two others to the Occupational Safety and Health Administration, and under one to the Mine Safety and Health Administration. Other agencies have important investigative or adjudicatory responsibilities as well. These include the Department of the Interior, which has both investigative and adjudicatory tasks, the Department of Defense (as to DoD contractors), and the independent

Mine Safety and Health Review Commission, whose job is only adjudicatory. With the exception of the relationship between the Wage and Hour Division and the Nuclear Regulatory Commission, there appears to be little active coordination among the agencies concerned.

Some of the statutes create elaborate hearing procedures; others are silent. They differ widely on matters as critical as the definition of protected conduct, the statute of limitations, remedies, and the machinery for adjudication and judicial review. Anomalies abound. For example, statutes of limitations range from 30 days to 6 months. Where whistleblowing in respect of violations of OSHA's own regulations are concerned, OSHA investigates, and adjudication is in the district courts. Where violations of the Surface Transportation Assistance Act of 1982 are in issue, on the other hand, OSHA investigates, but adjudication is by Department of Labor administrative law judges. The Mine Safety and Health Review Commission, an independent agency, decides whistleblowing cases; the Occupational Safety and Health Review Commission -- another independent agency -- does not. Some of the statutes cover safety-based refusals-to-work along with the kinds of disclosure most people think of as whistleblowing; some contemplate the award of punitive damages; some authorize temporary reinstatement while the merits of the case are being adjudicated.[6] Employees who lose at the agency level under most of the statutes may obtain judicial review; not so, however, in the case of violations of section 11(c) of the Occupational Safety and Health Act or section 211 of the Asbestos Hazard Emergency Response Act because the employees are completely dependent upon the willingness of the Labor Department to prosecute their causes on their behalf.

Because many of these discrepancies reflect vagaries of the legislative process as it has addressed various industries on an incremental or piecemeal basis over the years, a number of them are difficult to justify according to any neutral principle of public administration. On some issues, conscious substantive legislative choice and the political process are reflected in the current institutional arrangements for the protection of private sector health and safety whistleblowers. For this reason, as noted in the concluding section of this report, some of the matters that one might see every reason to alter may lie beyond the ordinary role of the Conference. On the other hand, the institutional hodge-podge described in this report transcends mere untidiness or asymmetry. At a certain point, divergent approaches can overwhelm the law by eroding public confidence in the fundamental coherence of the governmental process. That point has unquestionably been reached in Congress' efforts to protect those who suffer employee retaliation for calling attention to health and safety violations.

This report suggests that the Conference recommend (1) the enactment of [illegible] whistleblower legislation uniformly applicable to all activities subject to health and safety regulation by the federal government in order to encourage private actions in support of those federal programs and to ensure fairness, uniformity and rationality in the adjudicatory and remedial processes, and (2) specific actions (identified below) to be taken by the Secretary of Labor to improve the administration of the current diversity of private sector whistleblower protection programs.[7]

Taxonomy and Terminology

Although much of the business of ensuring that the laws are observed have become the responsibility of government rather than private citizens, the Supreme Court has rejected the notion that private citizens have no role to play.[8] By way of preface, it may be appropriate to try to orient the whistleblower protection provisions within the range of tools available to government for the achievement of public objectives. Some of these tools are negative, and some are positive. Some are direct (*i.e.*, used by the government itself) and some are indirect (relying rather on private individuals). For example, imprisonment, fines, penalties and forfeitures are familiar sanctions government uses to achieve its ends. These are direct and negative (or disincentives).[9] Rewards[10] or *qui tam* provisions might be thought of as indirect positive incentives in that they rely on or seek to encourage private interests to help achieve public ends. In some circumstances, the law may create an indirect negative incentive to encourage private citizens to assist in suppressing crime, as in the case of the Tariff Act provision making it a misdemeanor to refuse to assist a Customs officer.[11] The whistleblowing anti-retaliation provisions of federal law are best thought of as the removal of a disincentive for private assistance in achieving public ends, since the purpose of such provisions is to hold harmless those employees whose information must reach the government in order to help achieve public goals.[12]

In addition to this taxonomic note, mention might be made of certain terminological pitfalls in the whistleblowing area. Thus, the phrase "employee protection" is occasionally used to describe whistleblowing anti-retaliation measures.[13] This term, however, is also used in other contexts that have nothing to do with whistleblowing, such as the arrangements under section 507(e) of the Federal Water Pollution Control Act for investigations into employees' complaints that an employer has discharged or discriminated against them because of effluent limitations or orders issued by EPA under that statute,[14] or the seniority-protective provisions of the Airline Deregulation Act of 1978.[15] One recent enactment uses the term "Public Protection," which is so vague as to be essentially meaningless.[16]

The terms "discrimination" and "affirmative action" are used in describing protected whistleblowing and the fashioning of remedies, respectively. These obviously have special meanings in our society, and their use in this context can be a hindrance to understanding because it inappropriately implies a legal or doctrinal kinship with the race relations area, thereby bringing into play a very different set of concerns and values from those that underlie public policy in the whistleblowing area.

The Common Law Context

The background against which the federal legislation addressed in this study arose may be briefly sketched.[17] At common law (American, incidentally, rather than English), the rule evolved that an employee who did not have a contract that provided otherwise could be dismissed at the will of the employer. This doctrine is said to have its origins in a treatise published a little more than a century ago,[18] and promptly took root in the cases, which seem to have adopted this notion quite uncritically.[19] Eventually, however, some courts began to carve exceptions from the rule, and doctrines have arisen in a number of jurisdictions holding that there was a "public policy exception" to the "employment-at-will" rule. In summary, such exceptions hold that an employer will not be permitted to discharge an employee for conduct that advances a recognized public policy. The law on this point is essentially state law,[20] and the extent to which the doctrine applies to any particular set of facts is likely to vary dramatically from one jurisdiction to the next.

The Federal Response

In addition to judicial recognition of a "public policy exception" to the at-will doctrine, Congress and a number of state legislatures have enacted specific provisions ensuring protection against retaliation for employees who assert various rights. The federal legislation includes a variety of statutes only some of which deal with public health and safety programs.[21]

1. Public Sector Employees. Table 2 lists the various federal statutes that seek to protect from retaliation those public employees who engage in whistleblowing.[22] These statutes are beyond the scope of this study, but a few words may still be in order. The key statute is the [redacted] of 1978, which created broad protection for disclosures by civilian federal employees. Disclosures relating specifically to health and safety form only a small part of the field of protected conduct, and it is believed that few of the whistleblowing cases that have arisen under the CSRA have involved health or safety considerations. Most CSRA cases have to do with allegations of waste, fraud and abuse.

The most recent addition to the list of public sector antiretaliation laws is the Department of Defense Authorization Act, 1987, which extends protection to defense contractor employees for disclosures to Members of Congress, DoD and the Justice Department "relating to a substantial violation of law related to a defense contract."[23] This measure is a watered-down version of an earlier proposal that would have extended expressly to disclosures relating to "substantial and specific danger to public health and safety." In addition, the earlier version protected military personnel as well as contractor employees from reprisals.

2. Private Sector Employees. The range of federal statutes protecting private sector employees who "blow the whistle" on health and safety problems is considerable. These are set forth in Table 1. Together, they cover a large part of the American work force, and fall into several broad categories. Some are industry-based, such as those affecting mining, the nuclear industry or particular transportation modalities. Some address sweeping environmental concerns, such as those for which EPA is the program agency. And some cut across the broad spectrum of industrial activity in the country, such as OSHA, NLRA or LMRA.[24] The same conduct may violate more than one statute, thus involving multiple decisional tracks.[25]

The effectiveness of these arrangements is open to question. As two perceptive students of the field recently wrote, "[t]he record is particularly grim in industry; not one of the industrial whistleblowers we studied survived on the job."[26] "With few exceptions, they are driven out of not just their jobs, but their professions, too."[27]

3. "Twilight Zone" Cases. In a number of instances, it may be difficult to characterize the class protected by a whistleblower statute as "public" or "private." For example, the 1984 Defense Department authorization extended whistleblower protection, including health and safety disclosures, to employees of nonappropriated fund activities. Section 211(a) of the Asbestos Hazard Emergency Response Act of 1986 protects all persons from discrimination, but specifically includes employees of state and local educational agencies. State employees have found protection under the Safe Drinking Water Act,[28] and at least one case involving a federal employee--that of EPA employee Hugh Kaufman --has been filed with the Department of Labor under the Comprehensive Environmental Response, Compensation and Liability Act of 1980. Government contractor employees have been held to be protected under several of the whistleblower statutes.[29]

4. Caseload. Basic caseload figures for private sector health and safety whistleblowing cases in Fiscal Year 1985 appear in Table 7. The data show that by far the largest single category of complaints is under section 11(c) of the OSH Act. These cases,

however, do not involve agency hearings; if OSHA finds the case meritorious, it brings a civil action on behalf of the complaining employee. The only intra-agency remedy a complainant has is to seek review within OSHA of an initial decision not to pursue the case.[30] As the table shows, very few section 11(c) cases are pursued by the Department.[31]

The section 11(c) complaint caseload appears to have been fairly stable over the last several years.[32] For example, in FY78, OSHA received 3,000 employee complaints.[33] The corresponding numbers for FY83 and FY84 were 2522 and 2813, respectively.[34]

The next-largest group of cases involves the Surface Transportation Assistance Act, under which OSHA received 354 complaints during FY84.[35] The number of complaints declined to 248 in FY85.[36] "[I]n the first half of 1984, only eight cases were found to have merit. By the end of the year, twenty-five merit findings had been issued, and in 1985 fifty-eight merit findings were issued."[37] In FY85, the OALJ docketed 20 STAA cases following OSHA investigation, and conducted 6 APA hearings.

Third in frequency are retaliation complaints under the Federal Mine and Safety Health Act. MSHA investigated 276 complaints of safety- or health-related discrimination that were filed during FY85.[38]

The Department of Labor has created an Office of Administrative Law Judges to adjudicate cases under a broad range of statutory programs, most of which have nothing to do with whistleblowing. That office is, however, also responsible for a substantial part of the overall whistleblower caseload. Taken together, the OALJ received 77 such cases during FY85 under the various whistleblowing statutes it administers (including the 20 STAA cases referred to above). Of these, the vast majority were nuclear cases brought under the Energy Reorganization Act. Overall, the OALJ has received 264 whistleblowing cases since 1980.[39] A statistical breakdown of OALJ cases by statute appears in Table 8. The number of initial complaints received by the Department of Labor under these statutes is not available at this writing, but it appears that in FY85, the Wage and Hour Division conducted approximately 50 whistleblowing investigations, of which about half were found to be meritorious.

Statistics concerning the incidence of whistleblowing cases brought before the NLRB are also unavailable, although case summaries furnished by the Board's Office of General Counsel indicate that health and safety issues are not uncommon in Board proceedings.[40]

There have been very few discrimination complaints under the Surface Mining Control and Reclamation Act.

For comparative purposes, during FY85, the Office of Special Counsel of the Merit Systems Protection Board received 135 whistleblowing disclosures from federal employees.[41]

Shortcomings of the Current Arrangements

1. Jurisdictional Lacunae - The most obvious shortcoming of the current federal legislation protecting health and safety whistleblowers is the omission of major sectors of the economy where health and safety are unquestionably at stake. For example, Congress has yet to extend whistleblowing protection to: aviation, aerospace, vessel construction and operation, food and drugs, medical devices, and consumer products generally. While the major environmental laws administered by EPA include whistleblower provisions, one -- the Noise Control Act of 1972[42] -- does not.

A major omission has long been the vast number of government contractors to the extent that their activities were not covered by any of the subject-matter-specific retaliation statutes. This gap has been addressed in a variety of ways. First, some agencies, by regulation, impose the equivalent of a whistleblower provision. For example, in 1974, the Department of Labor and the Atomic Energy Commission agreed that ". . . Section 4(b) (1) (of the OSH Act) renders OSHA inapplicable to the working conditions of AEC contractor employees working in Government-owned or -leased, contractor/operated facilities as long as AEC continues to prescribe and enforce radiological and non-radiological occupational safety and health standards."[43]

Second, Congress has begun to recognize the need for coverage of government contractors in general. For example, in the aftermath of the Challenger disaster, Representative Markey observed:

> If the Morton Thiokol engineers were Federal employees, they would have recourse through the Civil Service Reform Act and the Office of Special Counsel. But as employees of a Government contractor, they have no protection.[44]

Congress has not yet passed general whistleblower protection for employees of government contractors, although it has done so for Department of Defense contractors in the Department of Defense Authorization Act, 1987.[45] Prior to passage of that legislation, a Defense Department contractor employee alleging retaliatory discharge could try to sue under the False Claims Act,[46] although the gravamen of such a case is fraud on the government rather than harm to the employee. Generic protection for contractor employees was introduced in the 99th Congress[47] and will be reintroduced in some form in the 100th.

Of course, not all health and safety programs involve concerns of the same gravity and magnitude. To take an obvious example, the potential health and safety implications of many violations of NRC regulations could be of a different order of magnitude from an isolated violation of trucking safety regulations. Comparing safety programs requires a consideration not only of the magnitude of the hazard, but also the probability of its occurrence. Perhaps a standard could be developed under which one could argue that different measures of employee protection are appropriate in different industrial or other contexts. On the other hand, one would think that anything that was sufficiently charged with a public interest to warrant federal regulation in the first place should also warrant protection for whistleblowers simply as an aid to enforcement and ensuring voluntary employer compliance with the underlying safety and health requirements.

One thoughtful reviewer of the draft of this study cautioned that expansion of whistleblower protections to persons in highly sensitive positions might make it too difficult to remove an incompetent or malicious employee. Where the superior can anticipate that his own integrity may be put in issue in the adjudicatory process, there may be a chilling effect on his or her willingness to take needed disciplinary action. The net result would be contrary to the public interest of health and safety.[48] This factor is difficult to assess in empirical terms, but there does seem to be a satisfactory response to it: the adjudicatory process must be reasonably prompt and reliable, and so managed as to offer no reason for malcontents or marginal performers to see it as an insurance policy against proper discipline. Agency decisionmakers should be alert to the detrimental effect on health and safety if managers and supervisors form the opinion that turning a blind eye to poor work is preferable to the inconvenience of an investigation and possible hearing. If supervisors are not to be deterred from performing their jobs, the process should be as free of wasted time and effort as possible. Nonetheless, as in any disputatious setting, there will always be some who are so put off at the prospect of a government investigation that they may "put up" with a poor performer longer than they should. There is, in this, however, nothing peculiar to this setting; how long would an unsafe employee be retained even though firing him or her would trigger some other kind of discrimination claim?

2. Protected Conduct. The health and safety whistleblowing statutes basically protect two kinds of conduct: (a) disclosures and, in a few instances, (b) refusals to work. In neither category has Congress acted uniformly.

(a) Protected Disclosures. Table 4 summarizes the statutory provisions that define protected disclosures. As a brief review of that listing will show, Congress has used a wide range of terms to describe the disclosures it wants to protect. It is however, difficult to understand why a uniform set of concepts could not be substituted.

To identify a few of the variations, there are provisions that apply to any disclosure (AHERA) disclosures to the media (OSHA),[49] disclosures to the agency or agencies responsible for administering the underlying regulatory program (*e.g.*, ERA), and disclosures to a union (FMSHA, OSHA) or employer (FMSHA, OSHA, SMCRA). The circuits are split on whether the ERA protects "internal" complaints to an employer.[50] The underlying validity of employee safety concerns under the ERA and environmental statutes has been held to be beyond the Labor Department's jurisdiction; the disclosure need only be made in good faith.[51]

Retaliation against concerted activity in response to safety concerns has been held to be an unfair labor practice by the NLRB, but the Board has recently emphasized that it "was not intended to be a forum in which to rectify all the injustices of the workplace."[52] Given the requirement for concerted activity, and the Board's emphasis on the fact that the employee in Meyers (a truckdriver who was retaliated against for refusing to work and reporting a safety violation to state authorities) might have an action under state law or (had it been in effect at the time) under the STAA, it seems improbable that the NLRA will prove to be of substantial benefit to whistleblowers who act alone -- particularly if their conduct might also be protected under other legislation.[53] Indeed, the current Board has expressly disclaimed an interest in "taking it upon ourselves to assist in the enforcement of other statutes."[54] This narrow perspective would seem to be at odds with the philosophy underlying the whistleblower provisions, the basic purpose of which is to assist in the achievement of substantive federal health and safety objectives. Because the statute of limitations for unfair labor practice complaints is longer than most of the whistleblowing statutes, contraction of the NLRB's role effectively reduces the protection available to employees. Meyers suggests that Congress should not look to the broad coverage of the NLRA as a reason to refrain from enacting generic private sector whistleblower legislation. The case has been appealed again to the District of Columbia Circuit.[55]

(b) Refusals to Work. Employee refusals to work are protected under the Energy Reorganization Act, Federal Mine Safety and Health Act, Federal Railroad Safety Authorization Act, Labor Management Relations Act, National Labor Relations Act and Surface Transportation Assistance Act.[56] The NLRA protects only "concerted activity" under section 7, rather than individual conduct.[57] Unless the refusal to work is part of a group effort or is an individual effort intended to enlist the support of others, or involves the assertion of a right grounded in a collective bargaining agreement,[58] it will not be protected, according to the NLRB's latest pronouncement on the issue.[59] Section 502 of the LMRA applies to employees who stop work "in good faith because of abnormally dangerous conditions,"[60] but it is unclear whether the provision protects only those workers actually at risk, or others who join with them.

In addition to the statutory provisions, safety-based refusals to work are protected by a regulation issued under the Occupational Safety and Health Act,[61] and upheld by the Supreme Court in Whirlpool Corp. v. Marshall.[62]

The refusal to work provisions typically require that the employee have an actual reasonable belief that he is in danger.[63] For example, the STAA provides:

> No person shall discharge, discipline, or in any manner discriminate against an employee . . . for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial vehicle safety and health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. . . . 49 U.S.C. sec. 2305(b) (Supp. III 1985).

3. Limitation of Actions. As shown in Table 1, the range of statutes of limitation applicable to health and safety whistleblowing complaints is considerable and, given the plain kinship among these statutes, intellectually indefensible. Absent some showing that would justify differences from one setting to another--and the author has been unable to discern the basis for such a showing--a single statute should govern.

What should the limitation period be? This is necessarily a matter of legislative judgment, and should reflect the fact that employers are unlikely to tell an employee that he or she is being dismissed as a reprisal for whistleblowing. as a result of this factor, the employee may not be aware at the time of discharge that a statutory right has been contravened.

If an employee must file more than a "notice of appeal" to trigger the whistleblowing hearing processes,[64] a 30-day statute is unreasonable, even if a notice is required to be posted advertising the complaint process. Moreover, an employee may well find it impossible to find counsel who can prepare a complaint in such a short period, particularly since much whistleblower litigation is conducted on a contingent fee basis in the hope of securing an award of attorneys fees. As shown in Table 8, a significant number of the whistleblowing cases brought to the DOL Office of Administrative Law Judges are dismissed for untimeliness. Other cases are dismissed for untimeliness by the investigative agencies. On balance, and considering the potential complexity of these cases, a single statute of limitations of not less than 180 days seems appropriate.

4. Investigative Arrangements. Table 1 identifies which agency is responsible for the investigation of whistleblower complaints under the private sector statutes. The Wage and Hour Division has been given responsibility for seven of the statutes under which hearings are conducted by the DOL Office of Administrative Law Judges, as well as for two statutes (FLSA and MSAWPA) under which adjudication is performed by the district courts.[65] OSHA is responsible for STAA cases that are eventually heard by the OALJ, as well as violations of OSHA's own regulations, which are heard in the district courts.

The basic issue that emerges from the assignment of investigative functions is whether those functions should be performed by the agency with responsibility for the underlying substantive safety program. On the one hand, if the subject matter is complex or technical, it could be argued that only the program agency would have the technical expertise necessary to evaluate whistleblower cases. On the other hand, there may be concern that the program agency might be less than impartial in whistleblower cases to the extent that a whistleblower's charges may be thought to imply that the program agency was ineffective.[66] Some program agencies are considered to be too sympathetic to the regulated industry, and lack of resources may lead to "dispirited" enforcement of safety regulations.[67] Congress recognized the possibility that an agency might have a conflict of interest, for example, when it broke up the former Atomic Energy Commission (which had both regulatory and promotional responsibilities) into the NRC and the former Energy Research and Development Administration.[68]

The case for having adjudication handled by the program agency based on the theory that substantive expertise in the underlying technical field is required is unpersuasive. For one thing, the program agency would always be available to supply expert witnesses on any truly technical issues, a technique that would presumably be used today in those cases that arise under statutes where adjuciation is handled by the district courts, which can claim no special expertise. More to the point, the whstleblowing statutes do not require a determination that the complainant's safety concern is technologically "correct," but rather that it is merely reasonable inthe circumstances. To be sure, even that question imposes on the decisionmaker an obligation to assess the merits of the worker's health or safety concern, but the burden on the decisionmaker would seem to be much less onerous than might be the case if the complainant were protected form reprisal only if his or her safety objection was not only reasonable but "correct."

Congress has not yet taken a clear position on the generic issue of agency conflicts, since under seven statutes DoD87, FMSHA, FRSAA, MSAWPA, NLRA, OSHA, SMCRA) the program agency is also the whistleblowing investigative agency.[69] While the statutes under which these roles are combined involve technical areas such as the environmental and nuclear contexts, certainly there are also technical aspects to cases arising under the two mining statutes, under each of which the program agency also investigates.

One useful approach might be to recognize that the investigation of whistleblowing is itself a specialty, and that the public interest would be served by having a single agency responsible for all whistleblowing investigations. Which agency that should be is not crucial, but presumably it should be one that is currently responsible for a substantial share of the government's total incoming caseload of whistleblower complaints. The available data,[70] tend to point toward OSHA, although the Wage and Hour Division has also amassed valuable experience under the varied statutes for which it has responsibility. The choice is probably best left to the Secretary of Labor. In any event, there is no need to add a brand new agency or additional staff for this purpose; the non-OSHA caseload data suggest that inter-agency transfers would suffice to meet any shift in agency responsibilities. If, on the other hand, substantial new categories of employees are brought under whistleblower provisions, some net increase in staff would be needed, unless there is slack available at present.

The program agencies should play an active role in support of the investigative agencies, even if they do not themselves have investigative responsibility. In technical cases, the program agencies can (and already do, on occasion) furnish technical advice to the investigative agencies. They can also be asked to provide expert witnesses or technical interrogators for hearings. At times, they might wish to appear as _amici_ in the whistleblower hearings.[71] And, to be sure, they should in each case receive reports on the outcome of hearings so that they may take whatever followup actions may be appropriate in light of the facts developed in the adjudicatory process. These reports should include the adjudicatory decisions as well as the investigative agency's comments and analysis, where appropriate.

The program agencies should take affirmative steps in aid of whistleblower protection, such as the issuance of employee protection regulations that could be enforced in the licensing context, where appropriate, as the NRC has done.[72] They can also impose useful notice-posting requirements by regulation so that employees will know in advance of their rights under the employee protection statutes.[73] This is particularly appropriate if Congress continues to insist on unrealistically short statutes of limitation.

Concern has been expressed over the short time typically allowed to the investigative agencies for processing employee complaints. Rather than simply eliminating the investigative phase (e.g., permitting the employee to institute an APA hearing without prior agency screening),[74] attention might be given to providing that if the investigative agency has not completed its investigation within a fixed period, the employee at that time could obtain an APA hearing on request.[75] The disadvantage of such an arrangement would be that the employee would be deprived of the potentially useful initial reaction of the agency: at present, a favorable initial ruling may be critical to the employee's ability to obtain counsel on a contingent fee basis.[76]

Another issue concerns the desirability of requiring or encouraging an employee to exhaust remedies provided by the employer as a precondition to an agency hearing.[77] Table 5 identifies those employee protection programs that require or suggest such exhaustion. Many firms today have internal mechanisms for the receipt of employee safety complaints; a few have contracted with outside companies to provide an external private dispute-ventilation machinery.[78] Before a broad requirement for such programs is imposed, however, serious thought should be given to the fact that an exhaustion requirement may only retard employee access to the public adjudicatory process, and arguably provide the employer with an unfair opportunity for early discovery possibly before the employee has legal representation. If attention is given to requiring such programs, the concerned agencies will have to address the discoverability of documents generated during the process (a matter that has already arisen in at least one case arising under the ERA)[79] and the need to toll the statute of limitations during exhaustion. One attorney representing employers has indicated that documents and statements generated by both sides in the course of exhaustive internal channels would be discoverable.[80] The author's view, on the basis of the information currently available, is that the public interest in prompt disposition of employee protection complaints outweighs the competing interest in potentially reducing the need for recourse to formal governmental processes. Certainly public policy "should not aim at driving every internal dispute toward litigation,"[81] but the system should also not create excessive hurdles.

5. Adjudicatory Procedures. Nowhere is the lack of consistency in federal protection of whistleblowers more apparent than in the arrangements Congress has directed for adjudication of complaints. As shown in Table 1, in 8 instances (involving cases arising under the environmental laws and the STAA), on-the-record APA hearings and recommended decisions are the task of the DOL Office of Administrative Law Judges,[82] subject to final action by the Secretary of Labor,[83] with the assistance of the DOL Office of Administrative Appeals. One source of concern has been the lack of detailed regulatory guidance as to the procedures to be followed in connection with review by the Secretary.[84] The Department of Labor has shown its concern over the case backlog in the Office of Administrative Appeals.[85] An additional step it should take to streamline that final layer of agency review would be to promulgate formal rules of appellate procedure. It has also been suggested that a 3-member appellate panel should be created to review ALJ decisions in whistleblower cases, and to permit interlocutory appeals from ALJ decisions on certain issues.[86]

Like DOL, the NLRB, Mine Safety and Health Review Commission and Interior Board of Land Appeals also provide on-the-record APA hearings. In railroad cases, the decisional body is the National Railroad Adjustment Board which does not provide an APA hearing, and in four categories of cases (nonappropriated fund employees, shipping containers, migrant workers and OSHA), the adjudicatory mechanism is a civil action in district court.

Given the caseload of the district courts, reliance on conventional civil actions rather than appellate court review of agency action in several of these important antiretaliation programs makes little sense. And in the case of complaints under section 11(c) of the Occupational Safety and Health Act, such reliance makes no sense at all when combined with the fact that the complainant has no control over the litigation, i.e., if the agency chooses to dismiss a complaint, the employee can only appeal that decision within the Department of Labor;[87] there is no provision for judicial review of the agency's decision not to pursue a section 11(c) case and no private right of action under that provision.[88] This is in sharp contrast with the other provisions which permit an employee who is disappointed with the outcome of an agency APA hearing to seek judicial review.

Another noteworthy aspect of the adjudicatory process involves the responsibility for representation of the employee. In MSHRC proceedings, the miner is represented by MSHA if the agency believes the complaint to be meritorious,[89] but in OALJ cases under the environmental laws, the Wage and Hour Division and the Secretary represent neither party.[90] Under the STAA, the Assistant Secretary for Occupational Safety and Health can prosecute the trucker's case in the OALJ hearing.[91] Under the NLRA, the General Counsel prosecutes.

Here again, the reasons for the discrepancies from one program to another are difficult to fathom. One would think that the same rule should apply across the board, but at the same time it is not clear tht every complainant will want or need the prosecutorial assistance of the investigatory agency. Where the complainant is privately represented, the interest in careful husbanding of agency resources (including the need to limit what might otherwise be redundant presentations in the hearing) suggests that the agency should step aside--not dropping out of the proceeding, but taking a more passive role, in deference to the trial strategy of the party's chosen counsel. That role would differ if the individual chooses to represent himself or herself, in which case a more active posture would be appropriate, in the interest of ensuring a full and effective airing of the issues. In short, the Secretary should not be required to represent a party who already has counsel, but if the investigatory agency concludes that the case is meritorious, it should be available to prosecute if the complainant so desires.

The statutes frequently set forth a schedule for agency action on the employee's complaint.[92] These schedules are more honored in the breach than the observance,[93] and they probably serve little practical purpose.[94] To the extent that they indirectly encourage hasty investigative agency positions in complex cases, they may well be counterproductive. Table 8 shows elapsed time for DOL case processing. To some extent the numbers may be misleading since it is often the case that both sides--and the ALJ--will agree that more time is needed if the substantive purpose of the statute is to be served. Litigants may and often do want to relax the schedule in any given case if, for example, more discovery is needed, or anticipated procedural or evidentiary complexities arise. The consented-to delays do not account for all the cases, but they suggest that a "rule of reason" or modus vivendi evolves, whatever the statutory language. The extreme delays in some cases are, however, whether consented to or not, a matter of concern, and the responsible officials may want to ensure that case-tracking mechanisms are in place to keep matters from getting out of hand.

Not suprisingly, both employer and employee representatives have expressed frustration with the current arrangements for DOL hearings. For example, employee counsel have called attention to what they perceive as a pattern of discovery abuse by industry counsel.[95] In one current case, there is a dispute over whether an employer's counsel frustrated the employee's ability to obtain the testimony of a needed witness.[96] On the other hand, some believe that there is a danger of providing a forum for frivolous claims, with no penalty to the complainant who can impose substantial costs on an employer simply by filing a complaint.[97] This criticism overlooks the fact that if a complainant violates an ALJ order, he may be defaulted,[98] although that is not a complete answer to the objection. None of the statutes provide for attorneys fees to be awarded against complainants.

To the extent that the current arrangements are deficient in failing to provide for judicial enforcement of DOL subpoenas, that omission should be remedied as soon as possible along the lines available for enforcement of other agency subpoenas.[99] Until Congress takes such action, the main protection against stonewalling in discovery is the availability of adverse inferences[100] or sanctions such as those provided under Rule 37(b)(2) of the Federal Rules of Civil Procedure. Sanctions alone, however, are not a sufficient response to willful failure to cooperate with discovery in a health or safety whistleblowing case because more is at stake than merely the outcome of the individual case. The public interest may require that the facts be developed in such a case, not simply that the individual employee obtain relief, whether through sanctions or a settlement. Moreover, even after judicial enforcement of subpoenas becomes available, ALJs should still be at liberty to draw adverse inferences or impose sanctions in the event of failure to make discovery because the need to apply to a federal court for subpoena enforcement may be too time-consuming and costly for the party seeking enforcement[101]--even though enforcement proceedings are supposed to be summary in nature.[102] A party's failure to press for judicial enforcement of an agency subpoena should for this reason not preclude either adverse inferences or appropriate agency sanctions.

Misconduct by counsel--another of the charges levelled by the complainant bar--is a serious matter that can thwart the achievement of congressional objectives and thereby endanger public health and safety. The arrangements currently in place certainly give agency decisionmakers ample authority to penalize such misconduct, and that author- ity should be invoked when good cause is shown.[103] In the unlikely event that ALJs prove to be indifferent on this score, the Secretary of Labor can be expected to take a firm stand on review. In addition, the usual forums for the consideration of ethical violations remain available. If the misconduct goes to far as to deprive a party of a fair hearing, the decision should be set aside on judicial review.

6. Remedies. The basic remedies available under the employee protection statutes are the familiar ones of backpay, reinstatement and attorney fees. In some instances, additional relief may be ordered. For example, actual damages are authorized under a number of statutes, and a variety of kinds of injury have been compensated for under those provisions.[104] These include medical expenses, front pay, and job search expenses. In one ERA case, an employee was awarded $10,000 for mental pain and suffering and injury to reputation.[105] Another received $70,000 "to cover past and future medical expenses . . . and as recompense for . . . humiliation and mental suffering."[106]

Exemplary or punitive damages are specifically authorized under only two of the environmental employee protection provisions (SDWA and TSCA); in other contexts the Department of Labor has held such damages to be unavailable.[107] Why those statutes alone have that provision is unclear aside from having been inspired by a common model. There is no conceivable reason for this discrepancy; a single rule should apply.

Agencies are also authorized to order abatement of the employer's conduct as well as "affirmative action," although little, if any, use has been made of the latter power. It is to be expected that future cases will see an increase in use of the "affirmative action" power.

Under the FMSHA and STAA, Congress has authorized interim relief of temporary reinstatement pending of complaining employees. Under both of these provisions, temporary reinstatement without a prior evidentiary hearing has been found unconstitu- tional; in the STAA case, the Supreme Court has the matter under advisement.[108]

Other remedies may well be available through the program agency if, for example, that agency is responsible for licensing the employer in some fashion. This is true under the Atomic Energy Act, and the NRC has taken administrative action against licensees on the basis of whistleblowing by employees.[109] However, as the NRC has indicated,[110] "the action taken by NRC focuses on the licensee to change the conduct of the discriminator. It is not a direct remedy to the employee."

7. Judicial Review. The arrangements for judicial review, outlined in Table, 1, fall into two basic categories. In the case of surface mining and railway whistleblowing, review lies in the district courts; in the other cases, agency action is reviewed in the courts of appeals. Given the similarity of the issues likely to be explored in all such cases, uniform review at the court of appeals level would be appropriate once there was underlying uniformity as to agency hearing procedures. Since surface mining cases go through the Interior Department hearing process with review by the Board of Land Appeals, there would seem to be no reason to require an intermediate stop at the district court.[111]

A more fundamental concern has to do with the fact that under OSHA and the Asbestos Hazard Emergency Response Act, if the ~~investigatory agency~~ declines to bring a civil action for the employee, the employee cannot obtain judicial review of that decision, and also cannot bring his own action against the employer. Agency decisions not to prosecute are understood to be non-reviewable, but that doctrine would seem to have no application where an individual employee has been harmed by the violation of a prohibition on retaliation. There is no apparent reason for closing the courthouse doors to such individuals while keeping them open under so many of the other statutes. If nothing else, such an approach drives whistleblowing cases into the state courts under state doctrines, even though the federal interest may be paramount.[112]

8. Interaction with Program Agencies. As Senator Grassley stressed at the Conference's October 1, 1986 public hearing, it is important not only that the whistleblower be protected from retaliation, but also that the substantive safety and health concern be addressed.[113] This requires close coordination between the agencies responsible for the underlying regulatory program and those responsible for administration of the anti-retaliation provisions.

To date, the program and investigative agencies have taken some steps to foster coordination to achieve better compliance with underlying safety and health obligations. Thus, the Wage and Hour Division and the NRC have a Memorandum of Understanding ("MOU") setting forth the working arrangements between their two agencies in nuclear whistleblowing cases.[114] That arrangement is viewed as ineffective by attorneys representing employees.[115] Similarly, OSHA and the NLRB have an MOU for the coordination of litigation under section 11(c) of OSHA and section 8 of the NLRA,[116] and MSHA and the Labor Board have entered into an agreement for the overlap in their jurisdictions.[117] Other agencies have not pursued the same approach.[118] For example, the Department of Transportation has only an informal working arrangement with the Department of Labor for cooperation in cases arising under the Surface Transportation Assistance Act,[119] and EPA (which has substantive responsibility for several environmental laws that have anti-retaliation provisions) has no written understanding with DOL. It also remains possible for a single act of retaliation to trigger more than one statutory scheme. Where this is the case, the agencies should either be permitted to conduct a joint hearing or one should serve as "lead agency" for the dispute. If all federal anti-retaliation protections were consolidated, the potential for wasteful duplication would be avoided.[120]

Given the fact that whistleblower protection is, after all, intended to protect public health and safety, formal arrangements should be in place to ensure (1) that all investigative agencies receive necessary assistance from program agencies, particularly in cases where technical information is important; (2) that program agencies receive prompt detailed reports of the results of all whistleblowing adjudicatory proceedings; and (3) that complaining employees be advised of the action taken by program agencies to remedy the safety problem about which the whistle was blown.[121]

9. Access to Law and Interagency Doctrinal Growth. Two final and, to a degree, related concerns involve the public availability of decisional law and the impediments to interaction between the separate bodies of law being developed by the adjudicatory agencies responsible for the various whistleblower sta-

tutes. While the decisions of the MSHRC, NLRB, and Interior Board of Land Appeals are reported, those of the DOL Office of Administrative Law Judges are not. OALJ decisions have been available only in Washington.[122] That office is responsible for a substantial portion of the overall whistleblower caseload. The result is that litigants before the OLJA have a more difficult time ascertaining the law (thus making proceedings less focused than might otherwise be the case, as well as making it more difficult for employers and employees even to know their basic rights). In addition, the desirable goal of cross-fertilization between the OALJ and other whistleblower adjudicatory agencies is thwarted. This insulation makes little sense and (building on the statutory patchwork) tends to retard the development of a coherent body of law in this area.

Fortunately, the Department of Labor has announced that it will publish all OALJ and Secretarial decisions in whistleblower cases beginning January 1, 1987.[123] This is a desirable step for which the Department should be commended, since employees and employers will be better to determine in advance what is lawful and what is not. However, it would also be useful if pre-1987 decisions were published as well. It is assumed, of course, that appropriate indices will also be provided.

Whether publication of the OALJ decisions is sufficient remains an open question. At present, doing research that steps from one anti-retaliation program to another is needlessly cumbersome because of the variety of reporting services. Publication of the OALJ cases will only partially alleviate that problem. If digesting and indexing continue to be according to separate designs for each agency with responsibility for whistleblowing cases, the present system will not have been improved as much as it could be. This is not to suggest that the bar currently confronts a "Tower of Babel" in the whistleblowing area, but the present arrangements necessarily leave the door open to doctrinal variations where these may be unwarranted. If Congress decides to bring all private sector health and safety whistleblowing jurisdiction under one "roof" with a single set of statutory provisions administered by a single agency, this concern will go away; if Congress does not, serious attention should be given to integrating the reporting arrangements.

Relation to Prior Conference Recommendations

The subject matter of this report touches on several prior administrative conference recommendations:

(a) Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies (Recommendation No. 69-6). While the agencies that were contacted were generally forthcoming with statistical data, in a number of instances it was difficult to obtain important detailed caseload data. The

Conference may wish to separately evaluate the effectiveness of data-gathering and -organization from this perspective.

(b) Discovery in Agency Adjudication (Recommendation No. 70-4). In keeping with paragraph 9 of this recommendation, Congress should ensure that agency subpoenas may be issued and judicially enforced in all whistleblowing cases.

(c) Subpoena Power in Formal Rulemaking and Formed Adjudication (Recommendation No. 74-1). The APA amendment prepared by the Conference would ensure compliance with agency subpoenas in whistleblowing cases, thereby improving the quality of agency decisionmaking and the record available for judicial review.

(d) The Choice of Forum for Judicial Review of Administrative Action (Recommendation No. 75-3). In keeping with this recommendation, it is presumed that review of agencies' formal adjudication be in the courts of appeals would be the norm with enforcement by the district courts.

(e) Time Limits on Agency Action (Recommendation No. 78-3). The Conference has questioned the use of legislatively-imposed time limits. While a *modus vivendi* has been reached in the context of the whistleblowing statutes here reviewed, any new legislation should not include such a requirement. Reasonable dispatch should still be the goal, as a matter of agency self-discipline. The available data suggest that it is unrealistic to try to force investigative or adjudicatory process into a rigid timetable. However, Congress might want to consider making it clear that if a deadline for agency action passes without such action, the employee or employer should be able to obtain an APA hearing without having to wait further. Similarly, if final action is withheld beyond the date prescribed, judicial assistance should be forthcoming more readily than has heretofore been permitted by the courts.[124]

(f) Agency Structure for Review of Decisions of Presiding Officers under the Administrative Procedure Act (Recommendation No. 83-3). Reference is made below to the need to articulate the procedures for secretarial review of decisions of the DOL Office of Administrative Law Judges.

(g) Preemption of State Regulation by Federal Agencies (Recommendation No. 84-5). It is improbable that a federal agency would have occasion to directly address the question of preemption in a whistleblowing case, unless, for example, a state remedy had been invoked and one side or the other sought to rely on the result for collateral estoppel or *res judicata* purposes. This seems unlikely because federal statutes of limitation almost certainly mean the federal case would proceed more promptly than the state case. Nonetheless, if such an issue were to arise, the views of the affected state(s) and other interested parties should be obtained in the adjudicatory process through invited *amicus* presentations. The matter is further addressed in the conclusion.

(h) Coordination of Public and Private Enforcement of Environmental Laws (Recommendation No. 85-3). The information-sharing concerns noted in paragraph 2 of this recommendation apply *mutatis mutandis* to federal whistleblower programs.

(i) Agencies' Use of Alternative Means of Dispute Resolution (Recommendation No. 86-3). The Conference's recent recommendation concerning ADR arguably bears on the private sector whistleblowing cases. While some private dispute-settlement or avoidance techniques have been tried with a view to encouraging the flow of safety concerns and defusing potential retaliation claims (particularly within the nuclear industry), it is believed that it would be premature to require any such procedure as a precondition to federal administrative adjudication. The Conference might, however, want to suggest that the concerned agencies consider the statute of limitations tolled while permissive internal employer remedies are being exhausted.

Conclusions and Recommendations

1. Matters within the Purview of the Administrative Conference. Clearly there are important questions for Congress as a result of any careful examination of the current arrangements for the protection of private sector health and safety whistleblowers. Some of these are, the author believes, appropriate for

conference recommendation because they involve issues that are essentially policy-neutral. We address these in this section of the report.

The Conference should make recommendations to the Congress and involved agencies as follows:

(a) Congress should enact omnibus whistleblowing legislation to replace all extant private sector health and safety whistleblowing provisions. That legislation should include:

> (i) protection for all private sector employees (including government contractor employees) and state and local government employees against retaliation for whistleblowing with respect to violations of federal safety and health requirements;
>
> (ii) assignment of investigative responsibility to the Secretary of Labor for all private sector health and safety whistleblowing retaliation cases;
>
> (iii) provision for on-the-record Department of Labor APA hearings in all private sector health and safety whistleblowing cases, with discretionary review by the Secretary of Labor, judicial review in the courts of appeals, and enforcement in the district courts;
>
> (iv) a single definition of protected conduct;
>
> (v) a single statute of limitations of not less than 180 days;
>
> (vi) a single provision for remedies (including debarment and suspension of government contractors);
>
> (vii) a grant of subpoena power to the Secretary of Labor for whistleblowing investigations and hearings, with provision for judicial enforcement; and

(viii) a grant of rulemaking authority to the Secretary of Labor with respect to investigative and adjudicatory procedures, notice posting requirements and mandatory coordination with program agencies.

(b) Subject to action by Congress as recommended above, the Secretary of Labor should:

(i) promulgate rules of appellate procedure governing practice and procedure in connection with the Secretary's review of decisions of the Office of Administrative Law Judges;

(ii) transfer all private sector health and safety whistleblowing investigative responsibility to the Occupational Safety and Health Administration, since (under section 11(c) of Occupational Safety and Health Act and section 405 of the Surface Transportation Assistance Act) that agency currently receives by far the largest number of private sector health and safety whistleblowing complaints;

(iii) develop, in consultation with the agencies responsible for the substantive regulatory program, detailed written procedures that are as nearly uniform as the Secretary deems practicable for coordinating investigation, adjudication and follow-up in whistleblowing cases; and

(iv) cause to be indexed and published all ALJ and Secretarial decisions in whistleblowing cases, including those rendered prior to January 1, 1987.

2. Matters not within the Purview of the Administrative Conference. In addition to the kinds of executive and legislative action noted immediately above, the current arrangements raise issues which, by impinging too for on political considerations, probably do not lend themselves to Conference recommendations. These should be mentioned if only to indicate that they have not been overlooked.

Preemption is the most important such matter. As was persuasively explained at the public hearing held by the Conference on October 1, 1986,[125] there is a considerable amount of whistleblowing litigation in the state and federal courts, resting not on federal whistleblowing protections, but on state law doctrines such as the public policy exception to the employment-at-will doctrine.[136] State law doctrines are evolving rapidly in this area, and it would be premature to consider legislation preempting state causes of action for retaliation that could be adjudicated in a federal forum. Given the current doctrinal ferment, this is an area in which the words of Justice Brandeis in New State Ice Co. v. Liebmann come to mind:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[127]

Or, as the First Circuit recently put it in a different context, "[t]he cutting edge of reform should be left to uncoerced community initiatives.[128]

For the moment at least, and mindful of the approach the Conference took in Recommendation No. 84-5, the States should be permitted to pursue their own courses of legal development. That process, so deeply rooted in our federal system, should not lightly be derailed, particularly at a time when all federal programs are under increasing scrutiny to prevent inappropriate intrusion on areas traditionally of concern to the states.

The other aspect which arguably is too heavily freighted with political considerations for Conference recommendation is the question of reassigning the responsibility for adjudication of safety-based whistleblowing retaliation complaints. The processes that led to the creation of an independent Mine Safety and Health Review Commission with responsibility for such cases and the creation of an independent Occupational Safety and Health Review Commission without such responsibility probably are of such a nature that a Conference recommendation would be of little utility absent a definite consensus among the interested constituencies.

In the circumstances, the Conference may conclude that it would be best advised to confine its recommendations to more structural or adjectival matters such as the enactment of uniform standards for protected conduct, adjudicatory procedures and remedies, strengthening the hearing process through judicially-enforceable subpoenas, and rationalization of the arrangements for judicial review.[129] It would certainly seem, however, that broader coverage of employees in industries with health and safety impacts is in order, and that all private sector health and safety federal whistleblowing protections ought to be administered by a single adjudicatory agency in the interest of fostering like treatment of like cases and maximizing the development of adjudicative expertise in employee protection matters.

Based on this study, there is reason for concern on several fronts, aside from the overall need to restructure, extend and rationalize the federal government's protection of health and safety whistleblowers in the private sector. The data indicate that in many cases it takes longer than Congress contemplated to investigate and adjudicate whistleblowers' claims. Such delays, which may reflect resource problems, can also arise where the parties and ALJ conclude that more time is needed to do a proper job. Where the parties do not so agree, however, the delay may deter some complainants. Delay may ill serve employer interests as well. In addition, the study suggests a need for greater interagency coordination. Consolidation of adjudicatory functions is an important step towards the solution of that problem, but so long as numerous program agencies have an interest in the subject, the need for improved coordination will be substantial. The Department of Labor may want to consider addressing this problem by developing a program for regular interagency coordination of policies with regard to the protection of whistleblowers, with the result a multi-agency omnibus Memorandum of Understanding and an established interagency coordinating body to encourage communication and interaction among the agencies and responsible staff.

Finally, although nothing in this study should be understood as intimating an opinion on whether justice was done in any particular whistleblowing case, it is concluded that (1) 30-day statutes of limitations are unreasonable, (2) judicially-enforceable subpeonas are essential to the conduct of effective whistleblowing adjudications, and (3) it offends basic notions of fairness that under section 11(c) of the occupational Safety and Health Act or section 211 of the Asbestos Hazard Emergency Response Act victims of retaliation have no access to the federal courts if their cases are not pursued by the Department of Labor.

---

1 Partner, Klores, Feldesman & Tucker, Washington, D.C.; B.A., Queens College, 1965, LL.B., Harvard, 1968. The author is grateful to Professor Marshall J. Breger, Chairman of the Administrative Conference, and Jeffrey S. Lubbers, Director of Research, for their assistance with this project. Thanks are also due to Michael P. Lagnado, Class of 1988, The National Law Center, George Washington University, who served as a Research Assistant under a stipend from the Conference, as well as the numerous governmental officials and members of the bar who were uniformly generous with their time and energy. References below to "Tr." refer to the record of a public hearing conducted by the Conference in Washington, D.C., on October 1, 1986. See 51 Fed. Reg. 32116 (1986) (Notice of Hearing).

2 In this report the term is also used to cover, where appropriate, employee refusals to work based on safety concerns. Such refusals are conceptually distinct from the core notion of whistleblowing identified in the text. They have, however, been treated as one as often as not and are included in this study. They are further addressed below under the heading of "Protected Conduct."

3 Other federal laws protect private sector whistleblowers in non-health and safety contexts. A recent example is section 3 of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, which amended 31 U.S.C. § 3730 (1982). In addition, numerous statutes prohibit retaliation against persons who complain of discrimination. E.g., Title VII, 42 U.S.C. § 2000(e)-3(a) (1982); Age Discrimination in Employment Act, 29 U.S.C. § 623(d) (1982). Because they do not relate to health and safety programs, these provisions are beyond the scope of the present study. Programs applicable to federal employees are also beyond the scope of this study although they are noted below and applicable legislation is identified in Table 2.

4 See, e.g., S. 2516, 99th Cong., 2d Sess. (1986) (generic protection for employees of government contractors).

5 Two excellent works that attempt a comprehensive view of federal protection of private sector whistleblowers are L. Larson & P. Borowski, Unjust Dismissal (1986 & Cum. Supp. Sept. 1986), and S. Kohn, Protecting Environmental and Nuclear Whistleblowers: A Litigation Manual (Gov't Accountability Project 1985).

6 Lower federal courts have held it unconstitutional to order reinstatement without a prior evidentiary hearing. One of those decisions is currently aviating the Supreme Court. Brock v. Roadway Express, Inc., No. 85-1530 (U.S.) (pending). MSHRC has

amended its regulations to remove the problem. 51 Fed. Reg. 16022 (1986).

7 For earlier recommendations for omnibus legislation see Abbot, *Remedies for Employees Discharged for Reporting an Employer's Violation of Federal Law*, 42 Wash. & Lee L. Rev. 1383, 1400 (1985); Jenkins, *Federal Legislative Exceptions to the At-Will Doctrine: Proposed Statutory Protection for Discharges Violative of Public Policy*, 47 Alb. L. Rev. 466, 513-24 (1983).

8 *United States v. New York Telephone Co.*, 434 U.S. 159, 175 n.24 (1977).

9 Congress could, for example, pass a law making it a crime to interfere with or discourage whistleblowing in areas of activity that fall within the federal government's sphere. The Ku Klux Klan Act, 18 U.S.C. § 241 (1982), the literal terms of which might cover such misconduct, has been given a narrow application, and there is no record of it having been used in this fashion.

10 *See, e.g.*, 18 U.S.C. § 3059 (1982).

11 19 U.S.C. § 507 (1982), *as amended by* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 3152. Some states also have laws making it a crime not to aid a policeman in an emergency. *See* Wash. Post, Nov. 11, 1972, at A7, col. 1 (N.C.).

12 Another disincentive removal would be to debar government contractors who retaliate against whistleblowers. This was proposed in the case of the Morton Thiokol engineers referred to above, *see* H.J.R. 634, 99th Cong., 2d Sess. (1986), but the matter died in committee. One of the engineers has sued the company and asserted an FICA claim against NASA. *Boisjoly v. Morton Thiokol Inc.*, Civil No. 87-194 (D.D.C. filed Jan. 28, 1987), *noted in* N.Y. Times, Jan. 29, 1987, at A16, col. 1.

13 *E.g.*, 29 C.F.R. § 24.1(a) (1986).

14 33 U.S.C. § 1367(e)(1982); 40 C.F.R. Pt. 108 (1986). *See also* 24 U.S.C. § 9610(e)(1982)(CERCLA); 42 U.S.C. § 6971 (e) (1982)(SWDA).

15 *See* 14 C.F.R. Pt. 314 (1986); 29 C.F.R. Pt. 220 (1986).

16 *See* Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, § 211.

17 The growth of interest in the whistleblowing area is eloquently attested by the fact that scholarly writers now no longer feel a need to set out the history. *E.g.*, Jenkins, *Federal*

Legislative Exceptions to the At-Will Doctrine: Proposed Statutory Protection for Discharges Violative of Public Policy, 47 Alb. L. Rev. 466, 467 & n.11 (1983); Bouffard, Retaliatory Discharge: A Public Policy Exception to the Employment At-Will Doctrine in Maine, 38 Me. L. Rev. 67, 70 n.6 (1986).

18 Feinman, The Development of the Employment at Will Rule, 20 Am. J. Legal Hist. 118, 126-27 (1976).

19 See generally L. Larson & P. Borowski, supra, § 2.04 et seq.

20 For a summary of federal common law developments in the wrongful discharge area see L. Larson & P. Borowski, supra, § 11.04.

21 The best single catalogue of the federal statutes appears in L. Larson & P. Borowski, supra, § 11.02-.03. Also very thoughtful are the articles by William R. Jenkins, cited supra, and Kohn & Kohn, An Overview of Federal and State Whistleblower Protections, 4 Antioch L.J. 99 (1986). Federal regulations also require state OSHA plans to include employee protection provisions. 29 C.F.R. § 1902.4(c)(2)(v) (1986).

22 Abbreviations appear in Table 10; citations to statutes and implementing regulations appear in Table 9.

23 Pub. L. No. 99-661, § 942(a)(1), adding 10 U.S.C. § 2409(a).

24 Section 502 of the Labor Management Relations Act, 29 U.S.C. § 143 (1982), stands on a somewhat different footing from the other statutes. It creates no remedy for retaliation, but rather prevents an employer from invoking a collective bargaining agreement's no-strike clause where one or more employees quits work "in good faith because of abnormally dangerous conditions."

25 See, e.g., Murphy v. Consolidation Coal Co., No. 83-ERA-4 (DOL Jan. 17, 1985) (approving settlement under TSCA); Murphy v. Consolidation Coal Co., No CH3-1-D (DOI Jan. 14, 1985) (dismissing SMCRA case upon settlement).

26 Glazer & Glazer, The Whistle-Blower's Plight, N.Y. Times, Aug. 13, 1986, at A23, col. 1.

27 Kleinfeld, The Whistle Blowers' Morning After, N.Y. Times, Nov. 9, 1986, § 3, at 1, cols. 2,4 (noting conclusion of Glazer research). "But that doesn't mean they always are reduced to dire poverty and icy isolation. Often, they are reincarnated in some new position." Id.

28 Bauch v. Landers and State of Florida Dep't of Environmental Regulation, Dkt. No. 79-SDWA-1 (OALJ). See also, e.g., Chase v.

Buncombe County, N.C., Dep't of Community Improvement, Dkt. No. 85-SWD-4 (Solid Waste Disposal Act; county landfill employee). In contrast, a state employee was held not protected under the Surface Mining Control and Reclamation Act on the theory that the state is not a person within the meaning of § 703 of that Act. *Leber v. Pa. Dept. of Environmental Resources*, 780 F.2d 372 (3d Cir.), *cert. denied*, 106 S.Ct. 3294 (1986).

29 *E.g.*, *McAllen v. EPA*, Dkt. No. 86-WPC-1 (OALJ Nov. 28, 1986); *Conley v. McClellan Air Force Base*, Dkt. No. 84.-WPC-1 (OALJ Sept. 12, 1984); *McGough v. U.S. Navy*, Dkt. No 86-ERA-18 (OALJ Aug. 19, 1986), slip op. at 3 n.3 (dictum). *But see* *Wensil v. B.F. Shaw Co.*, Dkt. No. 86-ERA-15 (OALJ July 8, 1986) (DOE contractor employees at plant not licensed by NRC *held* not protected, despite plain meaning of statute); Wash. Post, Jan. 8, 1987, A17, col. 1, at A18, col. 1 (noting pendency of *Wensil* jurisdictional issue regarding Savannah River DOE plant).

30 *E.g.*, *George v. Aztec Rental Center, Inc.*, 763 F.2d 184 (5th Cir. 1985); *Holmes v. Schneider Power Corp.*, 628 F.Supp. 937 (W.D. Pa. 1986); L. Larson & P. Borowski, *supra*, § 11.03 [20], at 11-38. This applies to conventional whistleblowing; in refusal- to-work situations, the employee can seek mandamus to require the Secretary to enforce the statute. 29 U.S.C. § 662(d) (1982).

31 *See also* Schibley, *The Employment-at-Will Doctrine: Providing a Public Policy Exception to Improve Worker Safety*, 16 U. Mich. J.L. Reform 435, 439-40 (1983) (noting deficiencies in DOL personnel and resources); B. Mintz, *OSHA History, Law, and Policy* 342 (1984).

32 *But see* 73 U.S. Dep't of Labor Ann. Rep. for FY85 121 (1986) (reference to "substantial increase" in § 11(c) cases, among others).

33 Solomon & Garcia, *Protecting the Corporate Whistle Blower Under Federal Anti-Retaliation Statutes*, 5 J. Corp. L. 275, 283 (1980).

34 1984 OSHA Ann. Rep. 56 (1985).

35 *Id*.

36 Teamsters for a Democratic Union, *Convoy Dispatch*, No. 59, at 3, col. 3 (Feb. 1986).

37 *Id*.

38 In FY85 and FY86, the full MSHRC decided 11 cases of safety complaints or refusals to work. Three cases involved both kinds of discrimination, 5 involved only safety or health complaints,

and 3 involved only a refusal to work. Letter from L. Joseph Ferrara, General Counsel, MSHRC, to the author, Oct. 31, 1986.

39 Testimony of Hon. Nahum Litt, Chief Judge, OALJ, Tr. 45-46.

40 *See* Letter from James Y. Callear, Freedom of Information Officer, NLRB, to the author, Sept. 4, 1986. For example, in 1985, the Board decided 8 cases involving safety-based refusals to work.

41 Off. of Special Counsel Ann. Rep. for FY85 15 (1985).

42 42 U.S.C. § 4901 *et seq*. (1982).

43 *See, e.g.*, Department of Energy Order No. 5483.1A; *In re Mestres*, Department of Energy Spec. App. Bd. (Dec. 27, 1984), *noted in* Wash. Post, Jan. 29, 1985, at A17, col. 1. Protection may also be afforded under contractual provisions. *See* Testimony of James E. Jensen, Tr. 107 (TVA).

44 132 Cong. Rec. H2710 (daily ed. May 14, 1986). Rep. Markey proposed debarring the employer.

45 Pub. L. No. 99-661, § 942, ___ Stat. ___, *adding* 10 U.S.C. § 2409.

46 *See* N.Y. Times, Sept. 21, 1986, at 1, col. 1 and 36, col. 2 (claim of discharge in retaliation for refusing to sign report that omitted details on flaws in new Army troop carrier).

47 Federal Government Contractors Personnel Protection Act of 1986, S. 2516, 99th Cong., 2d Sess. (1986). S. 2516 would have created a federal cause of action, enforceable by the individual in district court, for any reprisal against an officer or employee of a government contractor for disclosing to an agency information the individual "reasonably believes indicates . . . a substantial and specific danger to public health or safety." The agency head would also have been empowered to impose civil penalties of up to $500,000 per reprisal, subject to an on-the-record APA hearing with judicial review in district court.

48 Letter from John F. Sherman, III, Assistant Gen'l Counsel, New England Power Service Co., to the author, Dec. 15, 1986.

49 In one case, quoted in S. Kohn, *supra*, at 28, the Labor Department found that disclosures to news media were also protected under the WPCA. *See also* Kohn & Carpenter, *Nuclear Whistleblowing Protection and the Scope of Protected Activity under Section 210 of the Energy Reorganization Act*, 4 Antioch Ln.73, 86-89 (1986).

50 *Compare* *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), *with* *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 92 L. Ed.2d 724 (1986), *and* *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). *See also* *Wheeler v. Caterpillar Tractor Co.*, 108 Ill.2d 502, 485 N.E.2d 372, *cert. denied*, 90 L.Ed.2d 187 (1986).

51 S. Kohn, *supra*, at 28-29 (collecting cases).

52 *Meyers Industries, Inc.*, 281 NLRB No. 118, at 19 (Sept. 30, 1986), *pet. for review filed sub nom.* *Prill v. NLRB*, No. 86-1675 (D.C. Cir. Dec. 11, 1986). *See generally* Fasman, *Labor Board Adopts Conservative View on Employee Rights*, Legal Times, Nov. 10, 1986, at 12.

53 The Supreme Court has recognized that "parties may have a choice of federal remedies," *Connell Construction Co. v. Plumbers & Steamfitters Local Union 100*, 421 U.S. 616, 635 n.17 (1975), but one wonders whether dual federal remedies are necessary in the whistleblowing area. If federal whistleblowing legislation were reorganized as recommended *infra*, there would be less need to be concerned about limitations on the gloss applied to the NLRA, and no need for two federal agencies to address a single issue.

54 *Id*. *Meyers Industries*, *supra*, at 19.

55 *Prill v. NLRB*, No. 86-1675 (D.C. Cir. filed Dec. 11, 1986).

56 *See* Table 3 *infra*. While the statute is silent, the Secretary of Labor has construed the ERA to protect good faith reasonable refusals to work, *Pensyl v. Catalitic Inc.*, No. 83-ERA-2 (SOL Jan. 13, 1984), on the theory that the ERA and FMSHA are *in pari materia*. Slip op. at 5.

57 *See generally* Nothstein, *Employee Refusals to Work*, Labor (Fall 1982).

58 *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984).

59 *Meyers Industries, Inc.*, *supra*, at 20.

60 29 U.S.C. § 143 (1982).

61 29 C.F.R. § 977.12(b)(2) (1986).

62 445 U.S. 1 (1980).

63 *E.g.*, *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974) (requiring subjective good faith and objective

reasonableness under LMRA). FMSHA § 815(c) has been held to apply refusals to work based on a reasonable, good faith belief that the safety of another employee will be endangered. *Consolidation Coal Co. v. FMSHRC*, 795 F.2d 364 (4th Cir. 1986).

64 *Compare Richter v. Baldwin Associates*, Nos.84-ERA-09/10/11/12 (SOL Mar. 12, 1986) (*pro se* complaint, detailed pleading not required), *with* Testimony of Mozart G. Ratner, Tr. 100-01.

65 The FLSA is not listed on the chart because, although the child labor provisions of that legislation have a health and safety component, retaliation cases under those provisions are virtually unheard of.

66 Tr. 40-41, 73; GAP-TLPI Testimony at 11.

67 Letter from Julie Fosbinder, Teamsters for a Democratic Union, to Jeffrey S. Lubbers, Dec. 1, 1986 (referring to Bureau of Motor Carrier Safety, Dep't of Transportation.)

68 *See* Energy Reorganization Act of 1974, § 2(c), Pub. L. No. 93-438, 88 Stat. 1233.

69 Under DoD87, investigations are done by the IG, thus providing a measure of independence from the procurement agency. On the other hand, the IG's report simply goes to the Secretary, who naturally has ultimate responsibility for procurement.

70 *See* Table 7 *infra*.

71 *See* 29 C.F.R. § 18.12 (1986) (*amici* restricted to filing briefs).

72 10 C.F.R. § 50.7(c) (1986).
73 The NRC has also taken this step. 10 C.F.R. § 50.7(e) (1986). The Wage and Hour Division has imposed other notice-posting requirements by regulation. *E.g.*, 29 C.F.R. § 500.76(d)(1) (1986) (MSAWPA). *See also id.* § 516.4 (FLSA); *id.* § 1903.2(a) (OSHA); 42 U.S.C. § 2000e-10 (1982)(EEOC).

74 Testimony of Kennedy P. Richardson, Tr. 57-60; *See also* Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Dec. 2, 1986 suggesting, in the alternative, that the 30-day limit for WHD investigations be precatory).

75 *Cf.* 42 U.S.C. § 2000e-5(f)(1)(1982) (aggrieved person may institute civil action if EEOC dismisses complaint or fails to sue within 180 days of filing of charges.)

76 Testimony of Stephen M. Kohn, Tr. 84. *But see* Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Dec. 2, 1986 at 2-3: "The hypothesis that the Wage and Hour Division is necessary to induce private attorneys to prosecute Section 210 cases is refuted by the fact that no such inducement has ever been necessary for common law wrongful discharge claims and the fact that section 210 authorizes the administrative law judge to award attorney's fees which may well exceed what the attorney would otherwise receive under a typical contingent fee agreement. Nor is the Wage and Hour Division investigation necessary to 'screen out' frivolous cases since most private attorneys will decline to undertake cases with no plausible merit."

77 *See* Testimony of Sen. Charles E. Grassley, Tr. 14. 29 C.F.R. § 516.4 (1986). Another approach might be to encourage or require professionals such as engineers to avail themselves of professional societies' safety committees when ethical issues arise. Unfortunately, these mechanisms are not well known. *See* Lindorff, *Engineers' Duty to Speak Out*, The Nation, June 28, 1986, at 880. In addition, employees often do not have the luxury of being able to formulate a request for an opinion, and committees such as these lack the tools to find needed facts on issues that are often hotly contested.

78 *See generally* Wargo, *Tracking Employee Concerns*, 32 Nucl. Ind. No. 1, 3 (Jan. 1985).

79 *Durham v. Butler Service Group*. No. 86-ERA-9 (OALJ 1986), *discussed in* *Safety Concerns Programs Challenged by Intervenors*, 33 Nnd. Ind. No. 6, 16-17 (June 1986). Access to documents obtained under the SAFETEAM program marketed by a subsidiary of the Detroit Edison Co., *see generally* Heffner, *Limiting Risk: Improving Public Perception of Nuclear Plant Safety Through SAFETEAM* (remarks at American Nuclear Society Annual Meeting, Nov. 12, 1985), was permitted, subject to a protective order, in *Texas Util. Elec. Co* (Comanche Peak Stream Elec. Station, Units 1 & 2), Dkt. Nos. 50-445 to 446 (A.S.L.B. Dec. 23, 1985).

80 *See* Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Dec. 2, 1986, at 2.

81 *Id*.

82 Applicable procedural regulations appear in 29 C.F.R. Pt. 24 (1986). *See generally* S. Kohn, *supra*, chs. 1, 5-6, 8-9.

83 *See* 5 U.S.C. § 557(c) (1982); 24 C.F.R. § 24.6 (1986).

84 Testimony of Stephen M. Kohn, Tr. 70-71.

85 *See* 73 U.S. Dep't of Labor Ann. Rep. for FY85 174 (1986) (noting survey performed by IG). As of October 1, 1986, that office reports to the Undersecretary rather than the Solicitor of Labor. Testimony of Judith E. Kramer, Tr. 21.

86 Letter from Mozart G. Ratner to Jeffrey S. Lubbers, Dec. 10, 1986, at 2. The suggestion for an appellate panel appears to contemplate that the panel's jurisdiction would be nondiscretionary and that its decisions would not be subject to further review by the Secretary of Labor. An alternative might be to have a panel to hear argument on behalf of the Secretary, as was formerly done in connection with merchant marine disciplinary proceedings. *See* Fidell, *Improving Competence in the Merchant Marine: Suspension and Revocation Proceedings* 45 Mo. L. Rev. 1, 23 at n.151 (1980).

87 OSHA Inst. CPL 2.45A, ¶ 6 (Mar. 8, 1984).

88 S. Kohn, *supra*, at 174, *citing* *Taylor v. Brighton Corp.*, 616 F.2d 256, 258 (6th Cir. 1980).

89 30 U.S.C. § 815(c)(2) (1982); T. Means, *Discrimination and Miners' Rights Under the Federal Mine Safety and Health Act of 1977* 21 & n.105 (1984).

90 Wage & Hour Div., Field Operation Handbook § 52x03(e).

91 29 C.F.R. §§ 1978.107-.108, 51 Fed. Reg. 42093-94 (1986).

92 *E.g.*, 15 U.S.C. § 2622(b)(2)(A)(1982)(TSCA); 42 U.S.C § 5851(b)(2)(A)(1982)(ERA); 42 U.S.C. § 7622(b)(2)(A)(1982)(CAA); 42 U.S.C. § 300J-9(i)(2)(B)(i)(1982)(SDWA); *see also* 29 C.F.R. § 24.6(b)(1) (1986).

93 *Compare* S. Kohn, *supra*, at 3 & n.15, *and* Letter from Julie Fosbinder, Teamsters for a Democratic Union, to Jeffrey S. Lubbers, Dec. 1, 1986, at 2 (noting delays of up to 600 days in processing STAA complaints), *with* Brief for Appellants at 49 n.26, *Brock v. Roadway Express, Inc.*, No. 85-1530 (U.S.) (suggesting that prolonged delay in secretarial decision is not typical under STAA), *and* U.S. Dep't of Labor, Off. of Administrative Law Judges, *Summary of "Traditional" Labor Cases Adjudicated by the Office of Administrative Law Judges* 56-57 (1984) (postponements granted only for compelling reasons; time constraints in whistleblower cases "uniquely restrictive"). In one case arising under the ERA, it took the Wage and Hour Division over eight months to conclude that the 30-day statute of limitations barred the complaint. *Rose v. Sec'y of Labor*, 63 Ad.L.2d 889, 892 (6th Cir. 1986) (Edwards, J., concurring). DOL regulations call for the investigation to be completed in 30 days.

94 These periods are treated as directory, *i.e.*, precatory. *See, e.g.*, 29 C.F.R. § 1978.114, 51 Fed. Reg. 42095 (1986)

95 GAP-TLPI Testimony at 4-6; Testimony of Stephen M. Kohn, Tr. 71-72.

96 GAP-TLPI Testimony at 4 & 6 n.13; Galen, *An Ethical Furor Over a Witness*, Nat'l L.J., Dec. 22, 1986, at 3.

97 Tr. 84-86; *see also id.* at 97 (testimony of Mozart G. Ratner, dubitante).

98 29 C.F.R. § 24.5(e)(4)(1986).

99 *E.g.*, Atomic Energy Act §§ 161(c), 233, 42 U.S.C. § 2201(c), 2281 (1982); *see generally* 3 B. Mezines, J. Stein, & J. Gruff, *Administrative Law § 21.02* (G. Mitchell rev. 1985); 1 K. Davis, *Administrative Law Treatise* § 4.6 (2d ed. 1978); Fed. R. Civ. P. 81(a)(3).

100 *See Industrial Union Dep't v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972).

101 *Id.* at 1339.

102 *E.g.*, *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1064 (6th Cir. 1982).

103 *See*, *e.g.*, *Hasan v. Nuclear Power Services, Inc.*, No. 86-ERA-2 (OALJ Sept. 25, 1986) (disqualifying counsel).

104 *See* S. Kohn, *supra*, at 61-62 (collecting cases).

105 *DeFord v. TVA*, No. 81-ERA-1 (DOL Apr. 30, 1984), *following remand from DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983).

106 *English v. General Elec. Co.*, No. 85-ERA-2 (ALJ Aug. 1, 1985), *noted in* N.Y. Times, Aug. 4, 1985, at 23, cols. 1, 6.

107 *See* Table 6 *infra*; *Landers v. Commonwealth-Lord Joint Venture*, 83-ERA-5, ALJ op. at 17 (1983), *noted in* S. Kohn, *supra*, at 64 & n.18. Under several of the statutes, exemplary damages may be awarded if a civil action is brought to secure compliance with the Secretary's order. *See* 15 U.S.C. § 2622(d)(1982)(TSCA); 42 U.S.C. § 300J-9(i)(4)(1982)(SDWA); 42 U.S.C. § 5851(d)(1982)(ERA); 42 U.S.C. § 7622(d)(1982)(CAA).

108 *Brock v. Roadway Express, Inc.*, No. 85-1530 (U.S.) (pending); *see also Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985).

109 *See* 10 C.F.R. § 50.7(c) (1986).

110 Letter from A.B. Beach, Dep. Dir., Enforcement Staff, Off. Of Inspection of Enforcement, NRC, to Jeffrey S. Lubbers, Dec. 10, 1986.

111 *See*, *e.g.*, *Leber v. Pa. Dept. of Environmental Resources*, 780 F.2d 372 (3d Cir.), *cert*. *denied*, 106 S.Ct. 3294 (1986).

112 The fact that a § 11(c) case must be brought by the government who harms employees by rendering inapplicable any statute of limitations. *See*, *e.g.*, *Marshall v. Intermountain Elec. Co.*, 614 F.2d 260 (10th Cir. 1980).

113 The belief that nothing will be done to correct the problem a whistleblower discloses tends to discourage whistleblowing. Testimony of Sen. Charles E. Grassley, Tr. 12; MSPB, *Whistleblowing and the Federal Employee* 27-31 (1981), *cited in* Martin, *The Whistleblower Revisited*, 8 Geo. Mason L. Rev. 123 (1985).

114 47 Fed. Reg. 54585 (1982), *discussed in* *Kansas City Gas & Elec. Co. v. Brock*, 780 F2d 1505, 1509-10 (1th Cir. 1985), *cert*. *denied*, 92 L.Ed.2d 724 (1986). *See also* 29 C.F.R. § 24.4(a) (1986) (program agency to receive copy of all complaints).

115 GAP-TLPI Testimony at 10-11, *discussing* *Ryan v. Brock*, No. 86-4058 (2d Cir. 1986) (ordering DOL to reopen ERA case on basis of NRC report).

116 *See* 40 Fed. Reg. 26083 (1975), *reproduced in* OSHA Inst. Dis. 4A App. I, at I-2 (Aug. 25, 1985).

117 45 Fed. Reg. 6189 (1980).

118 Testimony of Stephen M. Kohn, Tr. 69-70.

119 *See generally* Letter from Anthony J. McMahon, Chief Counsel, Federal Highway Admin., to Marshall J. Breger, Chairman, Administrative Conference, Sept. 29, 1986.

120 In some instances, two remedial programs may work at cross purposes. For example, in *Thomas v. TVA*, No. SLO7528610208 (MSPB May 9, 1986), an MSPB administrative law judge overturned the dismissal of a supervisor at a nuclear power plant who had been found by TVA to have discriminated against one of his supervisors. Although the supervisor had invoked the protection of the ERA, he did so after the statute of limitations had expired. TVA nonetheless took disciplinary action based on the

supervisor's allegations, and it was that action that the MSPB proceeding set aside.

121 *Cf.* N.Y. State-City Comm'n on Integrity in Government, *Report and Recommendations on Whistleblowing Protection in New York* 5 (Oct. 8, 1986) ("complainant should be entitled to be informed of the final disposition of his complaint").

122 Testimony of Stephen M. Kohn, Tr. 70.

123 Tr. 76.

124 *See generally* 5 U.S.C. §§ 555(b), 706(1)(1982) (agencies to conclude matters within reasonable time; reviewing courts empowered to compel agency action unreasonably withheld); *e.g.*, *Public Citizen v. Dep't of Health & Human Services*, 632 F. Supp. 220, 226 (D.D.C. 1986).

125 *See generally* Testimony of Anthony Z. Roisman, Tr. 76-83.

126 *See generally* Fidell, *Nuclear Whistleblowing Issues in 1985* (remarks at American Nuclear Society Annual Meeting, Nov. 12, 1985), at 6, *citing* *Lang v. Pacific Gas & Elec. Co.*, No. 60185 (San Luis Obispo Co., Cal., Super. Ct.), *on removal*, Civil No. 85-6191HLH (C.D. Cal.); *Hermann v. H.P. Foley Co.*, No. 59672 (San Luis Obispo Co., Cal., Super. Ct.), *on removal*, Civil No. 85-2246-RG (Bx) (C.D. Cal. May 23, 1985); *Stokes v. Bechtel Corp.*, Civil No. C-84-8038 (N.D. Cal.), and No. 830446 (San Francisco Co., Cal., Super. Ct.); *Parks v. Bechtel Corp.*, Civil No. C-84-8037-WHO (N.D. Cal.); *Raymond Kaiser Engineers v. Superior Court*, No. 8027975 (Cal. Dist. Ct. App. Aug. 23, 1984); *Berstler v. Hirsch*, Civil No. 83-6122 (E.D. Pa. July 10, 1983); *Atchison v. Brown & Root, Inc.*, No. 83-29889 (Harris Co., Tex., Dist. Ct.), *on removal*, Civil No. H85-3568 (S.D. Tex.). *Stokes* and *Parks* were remanded to the California courts. *Stokes v. Bechtel North American Power Corp.*, 614 F.Supp. 732, 735 n.1 (N.D. Cal. 1985).

127 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

128 *Anaya v. Hansen*, 781 F.2d 1, 7 & n.8 (1st Cir. 1986).

129 Before any recommendation is made with respect to the allocation of responsibility for judicial review, it is assumed that the Conference would secure the views of the Judicial Conference of the United States and the Federal Judicial Center.

Table 1. Private Sector Employee Protection Statutes
(Health & Safety)

Statute	Program Agency	Investigative Agency	Adjudicatory Agency	Statute of Limitations*	Judicial Review
AHERA	EPA	DOL	Dist Cts	90 days	N/A
CAA	EPA	WHD	OALJ	30 days	Ct Apps
CERCLA	EPA	WHD	OALJ	30 days	Dist Cts
DOD87	DOD	DOD	None in Act	None in Act	N/A
ERA	NRC	WHD	OALJ	30 days	Ct Apps
FMSHA	MSHA	MSHA	MSHRC	60 days	Ct Apps
FRSAA	DOT (FRA)	FRA	Nat'l R.R. Adjustment Bd	30 days	Dist Cts
ISCA	DOT (USCG)	DOL	Dist Cts	60 days	N/A
LMRA	NLRB	N/A	NLRB	6 mos	Ct Apps
MSAWPA	WHD	WHD	Dist Cts	180 days	N/A
NLRA	NLRB	NLRB (OGC)	NLRB	6 mos	Ct Apps
OSHA	OSHA	OSHA	Dist Cts	30 days	N/A
SDWA	EPA	WHD	OALJ	30 days	Ct Apps
SMCRA	DOI (OSMRE)	OSMRE	BLA	30 days	Dist Cts
STAA	DOT (FHWA)	OSHA	OALJ	180 days	Ct Apps
SWDA	EPA	WHD	OALJ	30 days	Ct Apps
TSCA	EPA	WHD	OALJ	30 days	Ct Apps
WPCA	EPA	WHD	OALJ	30 days	Ct Apps

* The limitation periods refer to the time for filing a complaint with the investigative agency, rather than for seeking judicial review.

Table 2. Public Sector Employee Protection Statutes
(Health & Safety)

Statute	Program Agency	Investigative Agency	Adjudicatory Agency	Statute of Limitations	Judicial Review
ASHDCA	EDUC	None in Act	None in Act	None in Act	N/A
AHERA	EPA	DOL	Dist Cts	90 days	N/A
CSRA	OPM	OSC	MSPB	20 days	Fed Cir
DOD84	DOD	DOD IG + Components	OASD(A)	None in Act or regs	Dist Cts
EO12196	All (less military)	DOL	Program Agencies	None	N/A

Table 3. Protected Conduct

Statute	Whistleblowing	Reasonable Belief	Refusal to Work	Reasonable Belief
AHERA	Covered	Silent	Not Covered	N/A
ASHDCA	Covered	Silent	Not Covered	N/A
CAA	Covered	Silent	Not Covered	N/A
CERCLA	Covered	Silent	Not Covered	N/A
CSRA	Covered	Required	Not Covered	N/A
DOD84	Covered	Required	Not Covered	N/A
DOD87	Covered	Silent	Not Covered	N/A
EO12196	Covered	Silent	Not Covered	N/A
ERA	Covered	Silent	Covered*	Required*
FLSA	Covered	Silent	Not Covered	N/A
FMSHA	Covered	Silent**	Covered	Required
FRSAA	Covered	Silent	Covered	Required

ISCA	Covered	Silent	Not Covered	N/A
LMRA	N/A	N/A	Covered	Required***
MSAWPA	Covered	Required (just cause)	Not Covered	N/A
NLRA****			Covered	Subjective good faith
OSHA	Covered	Silent	Covered (reg)	Required
SDWA	Covered	Silent	Not Covered	N/A
SMCRA	Covered	Silent	Not Covered	N/A
STAA	Covered	Silent	Covered	Required
SWDA	Covered	Silent	Not Covered	N/A
TSCA	Covered	Silent	Not Covered	N/A
WPCA	Covered	Silent	Not Covered	N/A

* By interpretation. *Pensyl v. Catalytic, Inc*., No. 83- ERA-2 (SOL Jan. 13, 1984).

** Safety complaints are protected even if frivolous. *Munsey v. FMSHRC*, 595 F.2d 735, 742-43 (D.C. Cir. 1978).

*** Subjective good faith and objective reasonableness are required. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

**** Concerted activities are protected under section 7 of the NLRA, but the circuits are split as to the application of this provision to individual workers' safety complaints. *See Ewing v. NLRB*, 768 F.2d 51 (2d Cir. 1985); *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 106 S. Ct. 313 (1985); *NLRB v. Esco Elevators, Inc*., 736 F.2d 295 (5th Cir. 1984). On remand from *Prill*, the Board ruled that individuals' complaints are not protected. *Meyers Industries, Inc*., 281 NLRB No. 118 (Sept. 30, 1986), *pet. for review filed sub nom. Prill v. NLRB*, No. 86-1675 (D.C. Cir. Dec. 11, 1986).

Table 4. Protected Conduct--Protected Disclosures

Statute	
AHERA	". . . provided information relating to a potential violation of this title to any other person, including a State or the Federal Government"
ASHDCA	". . . brought to the attention of the public. . ."
CAA	Commencing EPA proceeding, testifying or assisting
CERCLA	Providing information to a state or federal government, filing proceeding, testifying
CSRA	Any disclosure not specifically prohibited by law
DOD84	Any disclosure not specifically prohibited by law
DOD87	Disclosure to a Member of Congress or an authorized official of DoD or the Department of Justice
EO12196	". . . for filing report. . ." (presumably with agency by which employee is employed)
ERA	Reporting to NRC (circuits divided on complaint to employer), or participating in proceedings
FMSHA	Complaint to MSHA, operator or union
FRSAA	Filing complaint, instituting proceeding, testifying
ISCA	Complaint to USCG
MSAWPA	Filing complaint, instituting proceeding, testifying
NLRA	Concerted activities
OSHA	Filing OSHA complaint, instituting proceeding, or testifying; construed to include complaints to other federal, state or local agencies, employers, unions or the media
SDWA	Commencing proceeding, testifying or assisting
SMCRA	Reporting to DOI, state regulatory authority, employer or his representative, or participating in adjudicatory or rulemaking proceedings
STAA	Filing complaint, instituting proceeding, testifying

SWDA	Filing or instituting proceeding or testifying
TSCA	Filing complaint, instituting proceeding, testifying
WPCA	Filing complaint, instituting proceeding, testifying

Table 5. *Exhaustion of Employer Remedies*

Statute	
AHERA	Not required
ASHDCA	Not required
CAA	Not required
CERCLA	Not required
CSRA	Not required
DOD84	Not required
DOD87	Not required
EO12196	Not required
ERA	Not required
FMSHA	Not required, but encouraged by MSHRC. *E.g.*, *Sec'y ex rel. Hogan & Ventura v. Emerald Mines Corp.*, 8 FMSHRC 1066 (1986), *quoting* *Sec'y ex rel. Dunmire & Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133 (1982).
FRSAA	Apparently required (45 U.S.C. secs. 153, 441(c) (1982))
ISCA	Not required
MSAWPA	Not required
NLRA	Not required by statute. Refer to collective bargaining agreements
OSHA	DOL encourages use of alternative remedies (29 C.F.R. sec. 1977.18 (1986)); employee must attempt to obtain corrective action from employer in refusal-to-work cases (*Whirlpool Corp. v. Marshall*, 445 U.S. 1, 10-11 (1980))

SDWA	Not required
SMCRA	Not required
STAA	Required for refusals-to-work. DOL encourages use of altnerative remedies. 29 C.F.R. sec. 1978.112, 51 Fed. Reg. 42095 (1986).
SWDA	Not required
TSCA	Not required
WPCA	Not required

Table 6. Remedies

Statute	**Exemplary Damages**	**Temporary Reinstatemen**
AHERA	Statute silent	
ASHDCA	Statute silent	
CAA	Held to be unavailable by DOL	
CERCLA	Statute silent	
CSRA	Statute silent	
DOD84	Statute silent	
DOD87	Statute silent	
EO12196	EO silent	
ERA	Held to be unavailable by DOL	
FMSHA	Statute silent	Regulation held unconstitutional*
FRSAA	Statute silent	
ISCA	Statute silent	
MSAWPA	Statute silent	
NLRA	Statute silent	
OSHA	Statute silent	

SDWA	Exemplary damages authorized	
SMCRA	Statute silent; possibly authorized by regulation (43 C.F.R. sec. 4.1204 (1986))	
STAA	Statute silent	**
SWDA	Held to be unavailable by DOL	
TSCA	Exemplary damages authorized	
WPCA	Held to be unavailable by DOL	

* *Compare* *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985), *with* 29 C.F.R. sec. 2700.44, 51 Fed. Reg. 16023 (1986).

** *See* *Brock v. Roadway Express, Inc.*, No. 85-1530 (U.S. (pending).

Table 7. *Caseload*, FY1985

Statute	Complaints Received	Complaints Found Meritorious	Cases Docketed by OALJ	Agency Hearings	Judicial Review Commenced
AHERA	N/A	N/A	N/A	N/A	N/A
ASHDCA				N/A	
CAA			3	1	
CERCLA				0	
ERA			44	11	2
FMSHA	276	59		26*	3
FRSAA	0	0		0	0
ISCA				N/A	
MSAWPA				N/A	
OSHA	2433	291		N/A	67**
SDWA			0	0	
SMCRA	1			0	1

STAA	248	20	6	4
SWDA		4	1	
TSCA		3	1	
WPCA		3	2	

* ALJ decisions; 8 cases were decided by full Commission.

** Cases sent to Solicitor of Labor for possible district court action. Perhaps half are pursued; some of those are settled.

Table 8. Whistleblower Case Chart

This chart was compiled from records available at the Office of Administrative Law Judges of the Department of Labor as of June 30, 1986. The left side of the chart indicates the disposition of each case. The following abbreviations apply:

Dism = dismissal
Sett/Withd = settlement or withdrawal of complaint
Untime = untimely filing of complaint
Disc Eq T = Discussion of equitable tolling of statute of limitations by ALJ
Grant Eq T = ALJ held statute to be equitably tolled
Judg Compl = judgment for employee
Reinstat = complainant ordered reinstated
Back Pay = back pay awarded ($ amount shown where revealed by record)
Atty Fees = attorneys fees awarded
Aff Relief = affirmative relief awarded
Misc Relief = miscellaneous relief ordered

Secretarial modifications of ALJ rulings are noted.

The right side of the chart shows the time elapsed for each phase of the case. The first column shows the number of days from the employer's action to the filing of the complaint. Succeeding columns indicate days elapsed between filing of the complaint and WHD's decision, ALJ hearing (if any), motion for summary disposition (if granted), ALJ decision, and secretarial decision. Where information was unavailable, a blank appears. Where a case was decided after hearing, but the hearing date is unknown, an "x" appears.

The final two columns show which cases were reviewed by the courts of appeals or enforced by the district courts.

Case No.		Dism.	Sett./ Withd.	Un-time.	Disc. Eq.T.	Grant Eq.T.	Judg. Compl.	Rein-stat.	Back Pay	Atty. Fees	Aff. Relief	Misc Relief	Compl. filed	Wage&Hour Decision	Hearing	Motion for Summ. Disp.	A.L.J. Decision	Sect. of L. Decision	Review by Ct. Appe.	Enforcement by Dist. Ct.
84-CAA-1	1	x	x										-	2[10]		111	107			
85-CAA-1	2	x																		
85-CAA-2	3	x	x										-							
78-SDWA-1	4	x		x	x															
79-SDWA-1	5	x											29		92		21	240		
79-SDWA-2	6	x		x									100		64		9	132		
79-SDWA-2[1]	7	x											5							
80-SDWA-1	8	x											16		99		147			
80-SDWA-2	9	x											42	25	72		90			
83-SDW-1	10	x											20		73		256	746		
81-SWDA-1	11						x	x	x	429.00					x					
85-SWD-1	12	x	x											30[11]	96		106	200		
85-SWD-3	13	x																		
85-SWD-4	14	x											29	5		34	46			
79-TSCA-1	15	x[2]		x	x								54		165		266	395	(see appendix)	
79-TSCA-1[3]	16	x[4]						5	x[6]	x[7]			11		66		227	356	x	
81-TSCA-1	17	x											8	60	x		141	174		
83-TSCA-1	18	x													61[12]		111			
84-TSC-1	19	x														101	133			
84-TSC-2	20	x	x										-							
85-TSC-3	21	x		x	x								443	5	120		172			
86-TSC-1	22	x	x										-							
WPCA-2	23	x													x		366	430		
WPCA-3	24	x		x	x								395			x	1049	1187		
80-WPCA-1	25						x	8	x			Cleared pers. file	28		159		256	275		
81-WPCA-1	26	x											28		164		126			
81-WPC-2	27	x	x										-		x					
83-WPC-1	28	x	x										-		x					
83-WPC-2	29						x	9	24,791	8092.27		Cleared pers. file	23	29	76		116			
84-WPC-1	30	x											1		85		126			
84-WPC-2	31	x		x									109	243	666		795			
85-WPC-1	32	x	x										-							
85-WPC-2	33	x													16[13]		126			
85-WPC-3	34						x	x	x	x				5[14]	124		254	261		
79-ERA-1	35						x	x	x	500.00		Cleared pers. file	5		136		205	280		

A9

Case No.	Dism.	Sett/ Withd.	Un-time	Disc Eq.T	Grant Eq.T	Judg Compl.	Rein-stat.	Back Pay	Atty. Fees	Aff. Relief	Misc. Relief	Compl. filed	Wage&Hour Decision	Hearing	Motion for Summ. Disp.	A.L.J. Decision	Sect. of L Decision	Review by Ct. Apps.	Enforcemen by Dist. C
79-ERA-3	x											55		211		241			
80-ERA-1	x											21		111		149	202		
80-ERA-2	x		x	x	x							32		59		95	148		
81-ERA-1						x	x	x	1,507.02		50,000 Reputation, etc 15	30	59	x		119	175	x 20	
81-ERA-2																			
81-ERA-3	(Decision not Found)																		
81-ERA-4	x													x		156 21	184		
81-ERA-5	x											29	25	122		175	213	x	
81-ERA-6						x	x	x						73 22		139	250	x	
81-ERA-7	x											21		x		253	5 yrs.		
81-ERA-8	x	x																	
81-ERA-9	x	x																	
82-ERA-1	x												9 23	x		77			
82-ERA-2												15 24		128		305	231		
82-ERA-3						x 16	x	x			5,000 pain, sufferring 7		38 25	72		100	267		
82-ERA-4	(See 83-ERA-4)					x	x	x				15	26	217		265			
82-ERA-5	x																		
82-ERA-6	x	x																	
82-ERA-7	x													x					
82-ERA-8	x												29 26	76		100			
82-ERA-9						x	x 18	x	,875.50		Clear Pers. File							x 27	
82-ERA-10	x	x																	
82-ERA-11	x		x	x	x							64	88	277		293			
82-ERA-13	x	x																	
83-ERA-2	x 19												59 28	x		291	469 29		
83-ERA-3	x																		
83-ERA-4	(Remedy for 82-ERA-4)						x	x	,600.00					40		66	2 1/2yrs.		
83-ERA-6	x	x																	
83-ERA-7	x											36		x		90	30mos.		
83-ERA-8	x	x																	
83-ERA-9	x											21	30	x		266	20mos.		
83-ERA-10	x	x																	
83-ERA-11	x	x																	
83-ERA-12						x	x	x	20,221.63	Post copy of order	Clear file.	19	33	110		156		x	
84-ERA-1	x											27	25	118		409	512		

Case No.	Dism.	Sett./ Withd.	Un-time	Disc. Eq.T.	Grant Judg. Eq.T. Compl.	Rein-stat.	Back Pay	Atty. Fees	Aff. Relief	Misc. Relief	Compl. filed	Wage & Hour Decision	Hearing	Motion for Summ. Disp.	A. L. J. Decision	Sect. of L. Decision	Review by Ct. Appe	Enforcement by Dist. Ct.
84-ERA-2	x	x																
84-ERA-4	x												x					
84-ERA-5	x	x										292		286	416	Sym. [illegible]		
84-ERA-6	x		x	x							1			383	355		x	
84-ERA-7	x	x																
84-ERA-8	x	x																
84-ERA-9	x																	
84-ERA-10	x										7			51	90			
84-ERA-11	x										7			51	90			
84-ERA-12	x										19			49	79			
84-ERA-13	(no decision available, only notice of hearing)										25			53	77			
84-ERA-14	x	x											x					
84-ERA-15	x[36]										25	40	102		267	Remd.		
84-ERA-16	x	x																
84-ERA-17					x[31]	x	x	6,500.00		4,219.00 Job search	20	30	42		170	444[35]		
84-ERA-18	x	x										30	206		233[32]			
84-ERA-19	x	x																
84-ERA-20	x	x																
84-ERA-21	x	x																
84-ERA-22	x	x																
84-ERA-23	x	x																
84-ERA-24	x										26	10	102		116	Remd.		
84-ERA-25	x	x																
84-ERA-26	x	x																
84-ERA-27	x		x	x[33]							30	30		337	413			
84-ERA-29	x	x																
84-ERA-30	x[33]												x					
84-ERA-31					x	x	x	x			28		100		291			
84-ERA-33	x	x																
84-ERA-35	x	x																
84-ERA-36	x	x																
84-ERA-37	x	x																
85-ERA-1	x	x																
85-ERA-2[34]					x	x	x	79,007.50		70,000 med. exp.	25	35	115		442	483		
85-ERA-3	x	x													452			

Case No.	Dism.	Sett./ Withd.	Un-time	Disc. Eq.T.	Grant Eq.T.	Judg Compl.	Rein-stat.	Back Pay	Atty. Fees	Aff. Relief	Misc. Relief	Compl. filed	Wage&Hour Decision	Hearing	Motion for Summ. Disp.	A. L. J. Decision	Sect. of L. Decision	Revew by Ct. Apps.	Enforcement by Dist.Ct.
85-ERA-5	x	x																	
85-ERA-6	x [38]																		
85-ERA-7						x [39]	x		5,593.75	Post copy of order		14	17	71		91	267		
85-ERA-8	x	x																	
85-ERA-9	x		x [40]																
85-ERA-10	x	x																	
85-ERA-11	x	x																	
85-ERA-12	x	x																	
85-ERA-13	x		x												x				
85-ERA-14	x	x																	
85-ERA-15	x											15			42	98			
85-ERA-16	x											8		156		244			
85-ERA-18,26	x	x																	
85-ERA-19	x	x																	
85-ERA-23				x [41]									91	224		309			
85-ERA-24	x												50 [46]	275		360	419		
85-ERA-25	x													107 [47]		218	261		
85-ERA-33						x	x	15,375.02	x			28	29	223		258			
85-ERA-34	x											27	55	77		119			
85-ERA-35,36	x		x	x								40	65	86		141			
85-ERA-38,39	x	x																	
85-ERA-40	x	x																	
85-ERA-41						x		5,054.35	x				65 [48]	188		257			
86-ERA-2	x											9	40		x	191			
86-ERA-3	x	x																	
86-ERA-4	x											11	32	101		206			
86-ERA-8						x		1,434.68	x			18	37	99		151			
86-ERA-10	x	x																	
86-ERA-11	[42]													96 [49]		116			
86-ERA-12	x [43]											20	29	66		114	293		
86-ERA-25	x [44]											28	31		x	119			
84-STA-1	x							5,360.00 [45]				142 [50]	[51]	207		250	370		
84-STA-2	x																		
84-STA-3	x	x																	
84-STA-4	x	x																	
84-STA-5	x	x																	

A12

Case No.	Dism.	Sett./ Withd.	Un-time	Disc. Eq.T.	Grant Eq.T.	Judg. Compl	Rein-stat.	Back Pay	Atty. fees	Aff. Relief	Misc. Relief	Compl. filed	OSHA Decision	Hearing	Motion for Summ. Disp.	A. L. J. Decision	Sect. of L. Decision	Review by Ct. Appe.	Enforcemen by Dist.C
4-STA-6						x		961.5	6,674.37			16	84	155		187	270	x	
14-STA-7	x																		
14-STA-8	x																		
14-STA-9	x	x																	
14-STA-10	x											177	156	212		239			
14-STA-11	x																		
14-STA-12	x	x																	
14-STA-13a	x[52]													x					
14-STA-13b	x						x[53]	1,354[54]				16	95	199		335	450		
14-STA-13c						x[55]	x	1,350			Cleared Para.file			x					
84-STA-14	x	x																	
84-STA-15	x											37	65	201		319	139		
84-STA-16	x		x[56]	x											x				
84-STA-18	x	x																	
84-STA-20	x		x	x								165	214	307		503	202		
85-STA-1	x	x																	
85-STA-2	x	x																	
85-STA-3						x		1,305.8	750.00		Clearedfile			x					
85-STA-4	x		x	x								220	212		x	332	192		
85-STA-5	x	x																	
85-STA-6	x	x																	
85-STA-7	x	x																	
85-STA-8						x	x	x				77		30		256	135		
85-STA-9	x											[illegible]	392	470		681	144		
85-STA-10	x	x																	
85-STA-11	x											35	124	301		458			
85-STA-12	x	x											209		372	379			
85-STA-13	x											16	155	306		259	410		
85-STA-14	x											23	224	455		530			
85-STA-15	x	x																	
86-STA-2	x											41	260	x		471			
86-STA-4	x	x																	
86-STA-5						x	x	x	1,049.46		Cleared para file	67	60	152		321	124		
86-STA-8	x												225	202		311	154		
86-STA-10	x	x																	
86-STA-11	x	x																	

Notes to Table 8

1 Two acts of retaliation alleged. First held untimely, second without merit.

2 Reversal of ALJ by Secretary of Labor, who granted equitable tolling and found for complainant.

3 Two complaints filed.

4 Reversal of ALJ by Secretary of Labor, who granted equitable tolling and found for complainant.

5 Complainant had not been fired.

6 Same

7 Decision of Secretary of Labor.

8 Complainant had not been fired.

9 Waived by complainant.

10-14 Assumes complainant had filed 30 days after employer's action.

15 Loss to reputation and mental distress award limited by Secretary of Labor.

16 Reversal of ALJ by Secretary of Labor, who dismissed complaint.

17 Reversal of ALJ by Secretary of Labor on damages for pain and suffering.

18 Reversal of ALJ by Secretary of Labor on reinstatement.

19 Reversal of ALJ by Secretary of Labor; remanded and settled.

20 Secretary of Labore's decision affirmed in part, reversed in the part; damages allowed for pain and suffering.

21-23 See note 10.

24 Complaint refiled 19 months later.

25 See note 10.

26 See note 10.

27 Overturns Secretary of Labor and ALJ.

Table 9. Citations to Statutes and Regulations

AHERA	Pub. L. No. 99-519, sec. 211, ___ Stat. ___
ASHDCA	11 U.S.C. sec. 525 (1982)
CAA	42 U.S.C. sec. 7622 (1982); 29 C.F.R. Pt. 24 (1986)
CERCLA	42 U.S.C. sec. 9610 (1982); 29 C.F.R. Pt. 24 (1986) (semble)
CSRA	5 U.S.C. sec. 2302(b)(8)(A) (1982); 5 C.F.R. Pts. 1252-53 (1986); 32 C.F.R. Pt. 145 (May 9, 1986) (DOD cooperation with OSC)
DOD84	10 U.S.C. sec. 1587 (Supp. III 1985); DOD Directive No. 1401.3 (July 19, 1985)
DOD87	Pub. L. No. 99-661, sec. 942, ___ Stat. ___, adding 10 U.S.C. sec. 2409
ERA	42 U.S.C. 5851 (1982); 10 C.F.R. sec. 50.7 (1986); 29 C.F.R. Pt. 14 (1986)
FMSHA	30 U.S.C. sec. 815(c) (1982); 29 C.F.R. Pt. 2700 (1986)
FRSAA	45 U.S.C. sec. 441 (1982)
ISCA	46 U.S.C. sec. 1506 (1982)
LMRA	29 U.S.C. sec. 143 (1982)
MSAWPA	29 U.S.C. sec. 1855(a) (1982); 29 C.F.R. sec. 500.9 (1986)
NLRA	29 U.S.C. sec. 158 (1982)
OSHA	29 U.S.C. sec. 660(c) (1982); 29 C.F.R. Pt. 1977 (1986)
SDWA	42 U.S.C. sec. 300j-9 (1982); 29 C.F.R. Pt. 24 (1986)
SMCRA	30 U.S.C. sec. 1293 (1982); 30 C.F.R. Pt. 865 (1986); 43 C.F.R. sec. 4.1200 (1986)

28 See note 10.

29 Remanded and settled.

30 Remanded by Secretary of Labor; dismissed again by ALJ.

31 Settled following remand on damages.

32 Assumes ALJ overturned on equitable tolling.

33 Secretary of Labor reversed ALJ, orders reinstatement and remands for backpay determination.

34 Pending.

35 Remanded by Secretary of Labor for premature closing of record.

36 Settled after ALJ decision.

37 Settled.

38 Settled after ALJ decision.

39 Settled before final order of the Secretary.

40 Complaint timely; request for hearing untimely.

41 Remanded by ALJ to WHD to determine whether violations occurred within 30 days of complaint.

42 Remanded by ALJ to WHD.

43 Remanded by Secretary of Labor.

44 ALJ decision reversed by Secretary of Labor.

45 Secretary of Labor decision.

46-49 See note 10.

50 For STAA cases, statute of limitations is 180 days.

51 For STAA cases, OSHA is investigative agency.

52 Secretary of Labor reversed decision of ALJ and ordered relief.

53 Secretary of Labor decision.

54 Secretary of Labor decision.

55 Secretary of Labor reversed ALJ and denied relief.

56 Complaint timely, request for hearing untimely.

STAA	49 U.S.C. sec. 2305 (Supp. III 1985); 29 C.F.R. Pt. 1978, 51 Fed. Reg. 42091 (1986)
SWDA	42 U.S.C. sec. 6971 (1982); 29 C.F.R. Pt. 24 (1986)
TSCA	15 U.S.C. sec. 2622 (1982); 29 C.F.R. Pt. 24 (1986)
WPCA	33 U.S.C. sec. 1367 (1982); 29 C.F.R. Pt. 24 (1986)

Table 10. Abbreviations

AHERA	Asbestos Hazard Emergency Response Act of 1986
ASHDCA	Asbestos School Hazard Detection and Control Act of 1980
BLA	Board of Land Appeals
CAA	Clean Air Act
CBO	Congressional Budget Office
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act of 1980
CSRA	Civil Service Reform Act of 1978
DOD	Department of Defense
DOD84	Department of Defense Authorization Act, 1984
DOD87	Department of Defense Authorization Act, 1987
DOI	Department of the Interior
DOL	Department of Labor
DOT	Department of Transportation
EDUC	Department of Education
EO12196	Occupational Safety and Health Programs for Federal Employees, 1980
EPA	Environmental Protection Agency
ERA	Energy Reorganization Act of 1974
FHWA	Federal Highway Administration
FMSHA	Federal Mine Safety and Health Act of 1977
FRA	Federal Railroad Administration
FRSAA	Federal Railroad Safety Authorization Act of 1980
GAO	General Accounting Office
IG	Inspector General
ISCA	International Safe Containers Act
LMRA	Labor Management Relations Act
MSAWPA	Migrant Seasonal and Agricultural Worker Protection Act
MSHA	Mine Safety and Health Administration
MSHRC	Mine Safety and Health Review Commission
MSPB	Merit Systems Protection Board

NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
NRC	Nuclear Regulatory Commission
OALJ	Office of Administrative Law Judges
OASD(A)	Office of the Assistant Secretary of Defense (Administration)
OGC	Office of General Counsel
OPM	Office of Personnel Management
OSC	Office of Special Counsel
OSHA	Williams-Steiger Occupational Safety and Health Act of 1970 (or Occupational Safety and Health Administration)
OSMRE	Office of Surface Mining Reclamation and Enforcement
OTA	Office of Technology Assessment
SDWA	Safe Drinking Water Act
SMCRA	Surface Mining Control and Reclamation Act of 1977
STAA	Surface Transportation Assistance Act of 1982
SWDA	Solid Waste Disposal Act
TSCA	Toxic Substances Control Act
USCG	U.S. Coast Guard
WHD	Wage and Hour Division
WPCA	Federal Water Pollution Control Act of 1972

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

OFFICE OF
THE CHAIRMAN

1 CFR § 305.87-2

Recommendation 87-2

Federal Protection of Private Sector Health and Safety Whistleblowers

Adopted June 11, 1987

Private sector employees who make disclosures concerning health and safety matters pertaining to the workplace are protected against retaliatory actions by over a dozen federal laws. By common usage these employees, as well as others who make similar disclosures concerning fraud or other misconduct (but who are beyond the Conference's current study),[1] have become known as whistleblowers. Under current statutes, for example, nuclear power plant workers, miners, truckers, and farm laborers are specifically protected when acting as whistleblowers. Other workers may be covered under the more general protections granted by the Occupational Safety and Health Act (OSHA) or various environmental laws.

The protection provided employees by the so-called whistleblower statutes under study serves the important public interest of helping ensure the health and safety of workers in the various regulated industries or activities, as well as that of the general public. The statutes are intended to create an environment in which an individual can bring a hazardous or unlawful situation to the attention of the public or the government without fear of personal reprisal. Such disclosures can be a valuable source of information especially where the public lacks the knowledge or access to information necessary to be fully informed on these important issues.

---

[1] The Conference has limited its study to health and safety related disclosures because in this area a pattern of federal statutory protections has emerged with sufficient experience to allow a study.

In its examination of the current federal statutory scheme designed to protect whistleblowers in the private sector, the Conference found that, as currently written, the various whistleblower statutes lack uniformity in a number of areas including the following:

1. Investigative responsibility is assigned to numerous agencies, including the Department of the Interior and several within the Department of Labor (DOL), with little coordination among them.

2. Adjudicatory responsibility is similarly divided. For example, while several statutes provide for adjudication by a DOL administrative law judge, others provide for decisions by different agencies or for trial in the district court.

3. Judicial review likewise differs. Some statutes provide for review in the district court, some in the court of appeals. And for some, no review is available.

4. Statutes of limitations for filing a complaint range from 30 days to 180 days.

5. Definitions of protected conduct differ according to statute. For example, protected disclosure may include any disclosure or may be more narrowly defined as disclosure to "the public," to the media, to the responsible agency, or to a union or employer. Protected conduct may or may not include refusals to work.

6. In certain cases where the designated agency declines to proceed with the complaint (under either the OSHA or the Asbestos Hazard Emergency Response Act), the complaining employee is left without any further administrative or judicial review.

As a result of these statutory incongruities, available procedures and protections may differ depending solely upon the industry to which an aggrieved employee belongs. For example, an employee seeking protection under the Clean Air Act (CAA) has 30 days in which to file a complaint, while an employee filing under provisions of the Migrant Seasonal and Agricultural Worker Protection Act (MSAWPA) has 180 days. And while both CAA and MSAWPA violations are investigated by the Wage and Hour Division of the Department of

Labor, adjudication of CAA complaints is before a DOL administrative law judge, while MSAWPA complaints are adjudicated in the district courts. The Conference has concluded that this lack of uniformity does not appear to be reasoned, but most likely reflects the incremental enactment of the various statutes over a period of years.

Accordingly, the Conference believes that omnibus whistleblower legislation providing for centralization of the investigative and adjudicative functions is needed. Because the Department of Labor now investigates and adjudicates such complaints under the majority of existing statutes, centralization in that Department is the logical choice. Although specialized expertise possessed by agencies responsible for the various regulatory programs covered by whistleblower provisions may be required in exceptional circumstances to resolve these disputes, the Conference believes that centralization is preferrable and that enforcement and adjudicative responsibilities should where feasible be assigned to the DOL.

The Conference study also discussed areas of regulation where gaps in whistleblower protection exist. These include the aviation and aeronautics industries, vessel construction and operation, and manufacturing and production of food, drugs, medical devices or consumer products generally. Where Congress has judged it necessary to regulate an industry so as to ensure the safety of its workplace, products, services or the environment, Congress should consider whether it is appropriate that enforcement of the regulatory scheme be strengthened by providing whistleblower protection for the industry's employees who report statutory violations.

The study also indicated that access to written decisional precedents in these cases needs to be improved. The Department of Labor's Office of Administrative Law Judges does not yet publish its decisions (although it has recently announced plans to do so), and a unified index for these decisions and those of other agency adjudicative bodies does not exist. Publication and indexing of existing case law should help narrow the issues for future adjudications, contribute to a sense of fairness in the adjudicatory process, and improve case management. In addition, the study found that, with certain exceptions, there is little interaction between the program agency and the investigating/adjudicating agency, thus diminishing the involvement of the lead program agencies. Procedures should be established by which program agencies provide assistance to investigative agencies, and adjudicatory agencies report decisions back to the program agency.

Finally, the Conference notes that there is a growing amount of litigation in state courts concerning whistleblowers, but does not take a position on whether federal statutes do or should preempt state law in this field. (ACUS Recommendation 84-5, Preemption of State Regulation by Federal Agencies, recommends that Congress address foreseeable preemption issues, and advises regulatory agencies to be aware of situations where a conflict might arise.)

With the increasing interest in these matters by Congress, the media and the general public, the Conference hopes that its study will provide a foundation for needed improvements.

RECOMMENDATION

I. In the interest of uniform treatment of private sector health and safety whistleblowers, Congress should enact omnibus legislation for the handling and resolution of whistleblowers' complaints. In enacting this legislation, Congress should review the categories of workers to which it is appropriate to extend whistleblower protection. As a general matter, the administration of this program should be centralized in the Department of Labor in furtherance of efficiency and harmony of results. If, however, Congress deems it necessary for a program agency to retain or receive investigative or adjudicative responsibility for whistleblower complaints, Congress should strive for uniformity in the substantive protections and procedures applicable to the separate program.[2] The omnibus and any other whistleblower legislation should include:

(A) a uniform definition of protected conduct;

(B) a uniform statute of limitations of not less than 180 days governing the filing of complaints;

(C) a uniform provision for remedies;

(D) assignment of preliminary investigative responsibility to the Secretary of Labor[3] for all private sector health and safety whistleblowing retaliation cases;

(E) authorization for the Secretary of Labor to employ alternative means of resolving these disputes, with the consent of the parties (see ACUS Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution);

---

[2] The Conference does not intend to suggest that whistleblower protection provisions now administered by the Department of Labor be reassigned. Nor is this recommendation intended to affect the existing jurisdiction of the National Labor Relations Board to investigate and adjudicate allegations of unfair labor practices.

[3] All references to the Secretary of Labor in recommendations I(D)-I(H) encompass other appropriate agency heads in instances where Congress deems it necessary for a program agency to retain responsibility.

(F) provision for an opportunity by any affected person to request an on-the-record APA hearing before a Department of Labor administrative law judge and for discretionary review by the Secretary of Labor, judicial review in the courts of appeals, and enforcement in the district courts;

(G) a grant of subpoena power to the Secretary of Labor for whistleblowing investigations and hearings, with provision for judicial enforcement; and

(H) a grant of rulemaking authority to the Secretary of Labor with respect to investigative and adjudicatory procedures, notice-posting requirements and mandatory coordination with other agencies.

II. Whether or not Congress enacts omnibus whistleblowing legislation, the Secretary of Labor should:

(A) promulgate rules of appellate procedure governing practice and procedure in connection with the Secretary's review of administrative law judge decisions in whistleblower cases;

(B) transfer primary private sector health and safety whistleblowing investigative responsibility to a single entity within the Department of Labor, absent compelling reasons to the contrary;

(C) develop, in consultation with the agencies responsible for the substantive regulatory programs, detailed written procedures for coordinating investigation, adjudication and follow-up in whistleblowing cases; and

(D) in accordance with the Freedom of Information Act, 5 U.S.C. §552(a)(2)(A), index and publish all ALJ and Secretarial decisions in whistleblowing cases, including those rendered prior to the date of this recommendation.

FELDESMAN, TUCKER, LEIFER, FIDELL & BANK
ATTORNEYS AT LAW
2001 L STREET, N.W
SUITE 300
WASHINGTON, DC 20036
(202) 466-8960

JAMES L. FELDESMAN*
MARNA S. TUCKER
JACQUELINE C. LEIFER
EUGENE R. FIDELL*
RITA M. BANK*
PAMELA B. FORBES*
SUSAN D. LAUSCHER
MARGARET H. LONG*
MARY S. PENCE*
JONATHAN M. DANA
MARTHA J.P. McQUADE*
JEFFREY K. STITH*
CAROL R. MANDEL'
EDWARD J. WALINSKY†
RACHEL S. GARRON
ANDREA L. PEARLΔ

ELIZABETH GUHRING*
OF COUNSEL

* ALSO ADMITTED IN MARYLAND
† ALSO ADMITTED IN VIRGINIA
' ADMITTED IN COLORADO ONLY
Δ ADMITTED IN NEW YORK AND MASSACHUSETTS ONLY

MARYLAND OFFICE
200A MONROE STREET
SUITE 100
ROCKVILLE, MARYLAND 20850
(301) 279-6770

VIRGINIA OFFICE
4118 LEONARD DRIVE
FAIRFAX, VIRGINIA 22030
(703) 352-8109

TELEFAX (202) 293-8103

March 3, 1989

Hon. Howard M. Metzenbaum
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510-6300

Re: Employee Health and Safety
Whistleblower Protection Act

Dear Senator Metzenbaum:

In connection with the Committee's consideration of S.436, I think it is quite important that due attention be given to the Labor Department's hearing caseload. As you can see, the enclosed data show that the number of cases actually docketed is quite modest. This summary does not include the other adjudicatory agencies such as the Mine Safety and Health Review Commission.

I am gratified that a private sector whistleblower measure is moving forward, and would be pleased to assist in any way I can in order to rationalize and strengthen the protections afforded to working people against reprisal.

I would be grateful if this could be made part of the record of the hearings.

Very truly yours,

Eugene R. Fidell

Eugene R. Fidell

Enclosures

SPECIAL REPORT FOR JUDGE VITTONE ON DOCKETED WHISTLE BLOWER CASES
COUNT IS BY CASE TYPE FOR FY 88 - FY 89 (10FEB89)

CASE NUMBER	RMD CODE	DOCKET DATE	HEARING DATE	TRANSCRPT DATE	DISPOSED DATE	DTY	DD	DAYS DOK TO DIS	DATE TO SECTY	SECTY DCSN DATE	RVA
88CAA00001		06OCT87			20JAN88	F	OD	106	20JAN88		
88CAA00002		29DEC87	08FEB88	03JUN88	22MAR88	F	OD	84	22MAR88	20JUN88	D
88CAA00003		20JAN88	25MAY88		25MAY88	F	OD	126			
88CAA00004		20JAN88	25MAY88		25MAY88	F	OD	126			
88CAA00005		04FEB88	25MAY88		25MAY88	F	OD	111			
88CAA00006		05FEB88	25MAY88								
88CAA00007		03JUN88	15FEB89								
88CAA00008		22JUN88		01NOV88	18NOV88	D	CO	149			
89CAA00001		01DEC88	09MAR89								
89CAA00002		16DEC88									
89CAA00003		11JAN89	23FEB89								
CTP TOTAL								702			
86ERA00004	M	05JUL88	12SEP88	13OCT88							
86ERA00018	M	06JUL88									
86ERA00019	M	06JUL88									
86ERA00020	M	06JUL88									
88ERA00001		08OCT87	27FEB89		06JAN89	F	OR	456			
88ERA00002		05OCT87			02FEB88	F	OD	120	02FEB88		
88ERA00003		20OCT87	24NOV87	23DEC87	05FEB88	D	RD	108	05FEB88		
88ERA00004		26OCT87	02FEB88	08MAR88							
88ERA00005		21OCT87			02DEC87	D	DO	42			
88ERA00006		14OCT87			18DEC87	F	OD	65	18DEC87		
88ERA00007		14OCT87			18DEC87	F	OD	65	18DEC87		
88ERA00008	M	15AUG88	26JAN89								
88ERA00009		11JAN88	19SEP88	09DEC88	28OCT88	F	OD	291			
88ERA00010		27JAN88	02MAR88		10MAR88	F	OD	43			
88ERA00011		22FEB88			29MAR88	D	CO	36	29MAR88	07DEC88	D
88ERA00012		25FEB88	01JUN88		23MAY88	F	OD	88	23MAY88		
88ERA00013		26FEB88	01JUN88		23MAY88	F	OD	87	23MAY88		
88ERA00014		26FEB88	13JUN88	29JUN88	04OCT88	D	RD	221	04OCT88		
88ERA00015		14MAR88	27MAR89								
88ERA00016		16MAR88	14SEP88		03AUG88	F	OD	140			
88ERA00017		23MAR88	10AUG88	08SEP88							
88ERA00018		19APR88	25MAY88		23MAY88	F	OD	34			
88ERA00019		19APR88									
88ERA00020		15APR88	01JUN88		23MAY88	F	OD	38	23MAY88		
88ERA00021		22APR88			18OCT88	D	RD	179	18OCT88		
88ERA00022		26APR88	11JUL88		02AUG88	D	RD	98	02AUG88		
88ERA00023		09MAY88	07JUN88		03JUN88	D	RD	25	03JUN88	25JUL88	D
88ERA00024		11MAY88	03OCT88		20SEP88	F	OD	132			
88ERA00025		11MAY88	05OCT88		20SEP88	F	OD	132	20SEP88	08DEC88	D
88ERA00026		12MAY88									
88ERA00027		20MAY88	26SEP88	24OCT88							
88ERA00028		23MAY88	08AUG88	08SEP88	08FEB89	D	RD	261	08FEB89		
88ERA00029		23MAY88	08AUG88	08SEP88	12JAN89	D	RD	234	12JAN89		
88ERA00030		23MAY88	08AUG88	08SEP88	08FEB89	D	RD	261	08FEB89		
88ERA00031		25MAY88	16MAY89	22SEP88							
88ERA00032		02JUN88	26JUL88		06JUL88	F	OD	34			
88ERA00033		15JUN88	17OCT88		03AUG88	F	OD	49			

SPECIAL REPORT FOR JUDGE VITTONE ON DOCKETED WHISTLE BLOWER CASES
COUNT IS BY CASE TYPE FOR FY 88 - FY 89 (10FEB89)

CASE NUMBER	RMD CODE	DOCKET DATE	HEARING DATE	TRANSCRPT DATE	DISPOSED DATE	DTY	DD	DAYS DOK TO DIS	DATE TO SECTY	SECTY DCSN DATE	RVA
88ERA00034		21JUN88			20JUL88	F	OD	29	25JUL88		
88ERA00035		06JUL88	31MAR89	21DEC88							
88ERA00036		09AUG88			08SEP88	F	OD	30			
88ERA00037		12AUG88									
88ERA00038		12AUG88									
88ERA00039		31AUG88	22FEB89								
88ERA00040		16SEP88	12JUN89								
88ERA00041		22SEP88	30NOV88								
88ERA00042		23SEP88	23JAN89								
89ERA00001		06OCT88	11JUL89								
89ERA00002		03OCT88			28NOV88	F	OD	56			
89ERA00003		11OCT88	28NOV88	23DEC88							
89ERA00004		11OCT88			04JAN89	D	RD	85			
89ERA00005		01NOV88	06JAN89		26JAN89	F	OD	86			
89ERA00006		22NOV88	13FEB89								
89ERA00007		29NOV88	01FEB89	01FEB89							
89ERA00008		02DEC88	14FEB89								
89ERA00009		07DEC88	03JAN89	09JAN89	02FEB89	F	OD	57			
89ERA00010		07DEC88	03JAN89	09JAN89	02FEB89	F	OD	57			
89ERA00011		22DEC88			24JAN89	D	RD	33	24JAN89		
89ERA00012		20DEC88									
89ERA00013		20DEC88									
89ERA00014		21DEC88									
89ERA00015		29DEC88	17JAN89								
89ERA00016		09JAN89									
89ERA00017		11JAN89									
89ERA00018		19JAN89									
89ERA00019		02FEB89	08FEB89								
CTP TOTAL								3,672			
89SDW00001		18JAN89	15FEB89								
CTP TOTAL											
88SWD00001		16FEB88	17MAY88	16JUN88							
88SWD00002		15JUN88									
88SWD00003		22JUL88	22FEB89								
88SWD00004		27JUL88									
CTP TOTAL											
85TSC00001	M	12OCT88									
88TSC00001		11JAN88	15AUG88								
88TSC00002		21JUN88	21FEB89								
88TSC00003		14JUL88									
89TSC00001		26OCT88	02DEC89	16DEC88							
89TSC00002		29DEC88	15FEB89								
CTP TOTAL											
88WPC00001		27NOV87	28JUN88		05AUG88	F	OD	252			
88WPC00002		21JAN88	24MAR88	20APR88	30NOV88	D	RD	314			
88WPC00003		08JUN88	01MAR89		09DEC88	F	OD	184	13DEC88		

```
2/14/89                  SPECIAL REPORT FOR JUDGE VITTONE ON DOCKETED WHISTLE BLOWER CASES                    PAGE
                                COUNT IS BY CASE TYPE FOR FY 88 - FY 89 (10FEB89)

             CASE      RMD   DOCKET    HEARING  TRANSCRPT DISPOSED                DAYS     DATE TO  SECTY DCSN
            NUMBER     CODE   DATE      DATE      DATE      DATE    DTY  DD   DOK TO DIS    SECTY      DATE    RVA

           88WPC00004        15JUN88   08DEC88   15DEC88   31JAN89   D   RD      230
          CTP TOTAL                                                                980

          FINAL TOTALS                                                           5,354

     91  RECORDS TOTALED
```

2/09/89

SPECIAL REPORT FOR JUDGE VITTONE ON DISPOSED WHISTLE BLOWER CASES
COUNT IS BY CASE TYPE FOR FY 89

CASE NUMBER	RMD CODE	DOCKET DATE	HEARING DATE	TRANSCRPT DATE	DISPOSED DATE	DTY	DD	DAYS DOK TO DIS	DATE TO SECTY	SECTY DCSN DATE	RVA
85CAA00001	H	11JUN87	07MAR88	06APR88	29NOV88	D	DB	537			
88CAA00008		22JUN88*		01NOV88	19NOV88	D	CO	149			
CTP TOTAL								686			
87ERA00031		13MAY87	11AUG88	14SEP88	09DEC88	D	RD	576	09DEC88		
87ERA00035		14JUL87	10MAR88	04APR88	12OCT88	D	RD	456	12OCT88		
87ERA00044		11AUG87	15OCT87	03DEC87	11OCT88	D	RD	427	11OCT88		
88ERA00001		08OCT87	10DEC87		06JAN89	F	OR	456			
88ERA00009		11JAN88	19SEP88	05DEC88	28OCT88	F	OD	291			
88ERA00014		26FEB88	13JUN88	29JUN88	04OCT88	D	RD	221	04OCT88		
88ERA00021		22APR88			18OCT88	D	RD	179	18OCT88		
88ERA00029		23MAY88	08AUG88	08SEP88	12JAN89	D	RD	234	12JAN89		
89ERA00002		03OCT88			28NOV88	F	OD	56			
89ERA00004		11OCT88			04JAN89	D	RD	85			
89ERA00005		01NOV88	06JAN89		26JAN89	F	OD	86			
89ERA00009		07DEC88	03JAN89	09JAN89	02FEB89	F	OD	57			
89ERA00010		07DEC88	03JAN89	09JAN89	02FEB89	F	OD	57			
89ERA00011		22DEC88			24JAN89	D	RD	33	24JAN89		
CTP TOTAL								3,214			
88WPC00002		21JAN88	24MAR88	20APR88	30NOV88	D	RD	314			
88WPC00003		08JUN88	01MAR89		09DEC88	F	OD	184	13DEC88		
88WPC00004		15JUN88	08DEC88	15DEC88	31JAN89	D	RD	230			
CTP TOTAL								728			
FINAL TOTALS								4,628			

19 RECORDS TOTALED

2/09/89

SPECIAL REPORT FOR JUDGE VITTONE ON DISPOSED WHISTLE BLOWER CASES

COUNT IS BY CASE TYPE FOR FY 88

CASE NUMBER	RMD CODE	DOCKET DATE	HEARING DATE	TRANSCRPT DATE	DISPOSED DATE	DTY	DD	DAYS DOK TO DIS	DATE TO SECTY	SECTY DCSN DATE	RVA
88CAA00001		06OCT87			20JAN88	F	OD	106	20JAN88		
88CAA00002		29DEC87	08FEB88	03JUN88	22MAR88	F	OD	84	22MAR88	20JUN88	D
88CAA00003		20JAN88	25MAY88		25MAY88	F	OD	126			
88CAA00004		20JAN88	25MAY88		25MAY88	F	OD	126			
88CAA00005		04FEB88	25MAY88		25MAY88	F	OD	111			
CTP TOTAL								553			
84ERA00009	M	26MAR86	07DEC87	22FEB88	17MAY88	D	RD	783	17MAY88		
84ERA00010	M	26MAR86	07DEC87	22FEB88	17MAY88	D	RD	783	17MAY88		
84ERA00011	M	26MAR86	07DEC87	22FEB88	17MAY88	D	RD	783	17MAY88		
84ERA00012	M	26MAR86	07DEC87	22FEB88	17MAY88	D	RD	783	17MAY88		
84ERA00027	M	04AUG87			26MAY88	F	OD	296			
84ERA00030	M	24JUN86	01DEC87	22DEC87	27JUL88	D	RD	764	27JUL88		
85ERA00023	M	01MAY87	08DEC87		16NOV87	D	DO	199	16NOV87	11APR88	A
86ERA00024		26MAR86	22JUN87	23JUL87	21OCT87	D	DO	574	21OCT87		
86ERA00036		24JUN86	15SEP87	26OCT87	03MAR88	D	RD	618	03MAR88		
86ERA00039		05SEP86	13JAN87	17FEB87	02NOV87	D	DB	423			
87ERA00010		02JAN87	13JUL87	06AUG87	16NOV87	D	RD	318	16NOV87	10JUN88	D
87ERA00014		30JAN87			28DEC87	F	OD	332			
87ERA00015		05FEB87	24MAR88		19FEB88	F	OD	379			
87ERA00016		13FEB87	11AUG87	31AUG87	20APR88	D	RD	432	20APR88		
87ERA00019		25MAR87		11AUG87	25JAN88	D	DO	306	25JAN88		
87ERA00020		21APR87			16OCT87	D	RD	178	16OCT87		
87ERA00021		03APR87	18JUN87	05OCT87	15JAN88	D	AB	287	15JAN88		
87ERA00023		13APR87			01DEC87	D	RD	232	01DEC87		
87ERA00024		13APR87			01DEC87	D	RD	232	01DEC87		
87ERA00028		07MAY87	03NOV87	30NOV87	23JUN88	D	RD	413	23JUN88		
87ERA00029		13MAY87	18JUL88	25AUG88	19SEP88	D	SJ	495			
87ERA00032		30SEP87			16OCT87	F	OD	16			
87ERA00033		19JUN87	02MAY88		06MAY88	F	OD	322	06MAY88	10AUG88	A
87ERA00034		23JUN87			12NOV87	F	OD	142	12NOV87		
87ERA00037		23JUL87	09OCT87	29OCT87	14JAN88	D	RD	175	14JAN88		
87ERA00038		28JUL87			13JUL88	D	RD	351			
87ERA00041		14JUL87	04DEC87		08DEC87	F	OD	147			
87ERA00042		20JUL87			16OCT87	D	RD	88	16OCT87	31MAR88	D
87ERA00043		28JUL87	30OCT87	14JAN88	08APR88	D	RD	255	08APR88		
87ERA00045		27AUG87			16OCT87	D	RD	50	16OCT87		
87ERA00046		27AUG87			16OCT87	D	RD	50	16OCT87		
87ERA00047		15SEP87	28OCT87		25JAN88	F	OD	132	25JAN88		
88ERA00002		05OCT87			02FEB88	F	OD	120	02FEB88		
88ERA00003		20OCT87	24NOV87	23DEC87	05FEB88	D	RD	108	05FEB88		
88ERA00005		21OCT87			02DEC87	D	DO	42			
88ERA00006		14OCT87			18DEC87	F	OD	65	18DEC87		
88ERA00007		14OCT87			18DEC87	F	OD	65	18DEC87		
88ERA00010		27JAN88	02MAR88		10MAR88	F	OD	43			
88ERA00011		22FEB88			29MAR88	D	CO	36	29MAR88	07DEC88	D
88ERA00012		25FEB88	01JUN88		23MAY88	F	OD	88	23MAY88		
88ERA00013		26FEB88	01JUN88		23MAY88	F	OD	87	23MAY88		
88ERA00016		16MAR88	14SEP88		03AUG88	F	OD	140			
88ERA00018		19APR88	25MAY88		23MAY88	F	OD	34			

```
2/09/89                          SPECIAL REPORT FOR JUDGE VITTON ON DISPOSED WHISTLE BLOWER CASES
                                               COUNT IS BY CASE TYPE FOR FY 88


      CASE     RMD   DOCKET     HEARING  TRANSCRPT DISPOSED                  DAYS     DATE TO  SECTY DCSN
     NUMBER    CODE   DATE       DATE      DATE      DATE    DTY  DD  DKT TO DIS     SECTY      DATE     RVW

    88ERA00020        15APR88   01JUN88              23MAY88  F   OD         38     23MAY88
    88ERA00022        26APR88   11JUL88              02AUG88  D   RD         98     02AUG88
    88ERA00023        09MAY88   07JUN88              03JUN88  D   RD         25     03JUN88   25JUL88    D
    88ERA00024        11MAY88   03OCT88              20SEP88  F   OD        132
    88ERA00025        11MAY88   05OCT88              20SEP88  F   OD        132     20SEP88   06DEC88    D
    88ERA00032        02JUN88   26JUL88              06JUL88  F   OD         34
    88ERA00033        15JUN88   17OCT88              01AUG88  F   OD         47
    88ERA00034        21JUN88                        20JUL88  F   OD         29     25JUL88
    88ERA00036        09AUG88                        08SEP88  F   OD         30
  CTP TOTAL                                                               12,733

    87SWD00002        21APR87   13AUG87              19FEB88  F   OD        304
  CTP TOTAL                                                                  304

    87TSC00001        30MAR87   05MAY87   06JUL87    10MAR88  D   RD        346
    87TSC00002        02APR87   06OCT87   10NOV87    14JUL88  D   RD        469     14JUL88
    87TSC00004        23JUN87   25AUG87   10SEP87    29OCT87  D   RD        128     29OCT87
    87TSC00005        30JUN87   24NOV87              17FEB88  D   DO        232     17FEB88
  CTP TOTAL                                                                1,175

    84WPC00002   M    10APR87   20JUL87   15SEP87    12FEB88  D   RD        308     12FEB88
    88WPC00001        27NOV87   28JUN88              05AUG88  F   OD        252
  CTP TOTAL                                                                  560

  FINAL TOTALS                                                            15,325

64   RECORDS TOTALED
```

NBC
National Broiler Council

COMMENTS OF THE
NATIONAL BROILER COUNCIL
on the
EMPLOYEE HEALTH AND SAFETY WHISTLEBLOWER PROTECTION ACT (S. 436)
before the
SUBCOMMITTEE ON LABOR
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

MARCH 20, 1989

Submitted by:

George B. Watts
President
National Broiler Council
1155 15th Street, N.W.
Suite 614
Washington, D.C. 20005

COMMENTS OF THE NATIONAL BROILER COUNCIL

March 20, 1989

Mr. Chairman:

The following are comments of the National Broiler Council ("NBC") on S. 436, the Employee Health and Safety Whistleblower Protection Act. NBC is a not-for-profit trade association representing the producers/processors of more than 90 percent of the broiler chickens consumed in the United States.

NBC has a number of serious concerns with the bill, both with its concept and with a number of its specific provisions. In terms of the overall concept of whistleblower legislation, we believe that workers simply do not need the kind of protection embodied in this proposed law. We also have many specific concerns about the bill, including such matters as its creation of duplicate remedies, its misallocations of traditional burdens of proof, and the excessive damages that could be awarded under the bill in its current form.

The bill also does not take into account a number of other issues, which we need not address in depth, but which we believe make the bill too onerous on the great majority of employers who are not guilty of the sort of conduct the bill seeks to prevent. For example, the bill's inducement to employees to file baseless complaints challenging legitimate discharges and rely upon so-called whistleblower protection; the lengthy statute of limitation; the allowance of attorneys' fees to complainants, but not to employers who incur great expense defending frivolous complaints; and the bill's complex complaint and hearing procedures impose burdens on employers far out of proportion to the interests the bill seeks to serve -- the protection of those relatively few employees who have been the victims of unfair retaliatory treatment by their employers.

Overall Concept

The apparent premise behind the bill is that workers need the protection of the Federal government to deter employers from discriminating against employees who report violations of law committed by their employers. One of the proposed findings in the bill is that employees who report the unlawful or hazardous activities of their employers "are not adequately protected against reprisal" by their employers. Based upon that premise, the bill proposes far-reaching and burdensome administrative procedures to protect workers.

NBC disagrees with the bill's premise. American workers have access to substantial protections against reprisals by their employers arising out of the employees' whistleblowing activities. In addition to the sixteen separate Federal laws referenced in Section 3 of the bill that already protect whistleblowers, NBC is aware of Federal and state court decisions throughout the country awarding substantial damages to persons fired for reporting, or threatening to report, unlawful or hazardous activities of their employers.

The common law rule that an employer may terminate an employee for any reason, good or bad, has long been extinct. Employers are no longer free to fire an employee because of reporting an unlawful or unsafe practice. Virtually every state which has considered the issue, including many traditional "employment-at-will" states, have allowed discharged workers to recover damages if their discharge violated public policy. Employees fired for reporting conditions posing a safety or health threat to workers or the general public, or for reporting their employer's violations of law have uniformly been protected under this rule of law. The remedies for such "whistleblowers" -- which are generally tort remedies including punitive damages -- already afford workers ample protection against reprisals.

Because of the existing protections, this is not an area in which Congress ought to become involved. NBC does not see any overriding need to burden employers with another Federal requirement and to create yet another bureaucracy within the

Department of Labor with jurisdiction over a particular employment issue. If anything, Congress and state legislatures should be looking into ways to normalize the out-of-control tort damages awarded to employees, and not seeking to create a separate and redundant liability for employers. Presumably, in including Section 8(b), which expressly states that the bill is not intended to supplant other rights and remedies, the authors implicitly recognized this.

Specific Provisions

There are many specific provisions in the bill that are troublesome. Among them is the bill's refusal to preempt or preclude other forms of relief available to whistleblowers. In its current form, the bill would allow an employee to sue his or her employer in state court and, at the same time, file a separate complaint with the United States Department of Labor. Those dual remedies are unfair to employers, unduly burdensome on the courts and the Labor Department, and simply not necessary to protect the rights of workers.

Similarly, Section 5(g), which would allow a complainant to file a lawsuit in the United States district courts *while* a complaint is pending before an administrative law judge, creates the same capacity for duplicative and redundant proceedings, and duplicative costs. That provision would allow an individual to file a lawsuit if the Labor Department failed to issue its decision within the strict time limits provided in the bill. Thus, an employer, after incurring the substantial expenses of defending an administrative enforcement action, may be required to duplicate that expense solely because of the failure of the Department of Labor to issue a timely decision. Such a provision, given the bill's short time limits, would inevitably result in waste and duplication of effort by both complainants and employers.

Moreover, such a provision would unduly burden the already crowded Federal courts with cases within the expertise of a Federal agency and would be in direct conflict with the traditional rule that a litigant must exhaust his or her administrative remedies before bringing an action in court.

The burden of proof allocation under Section 5(c)(4) is also highly objectionable, inconsistent with other laws providing protection from employment discrimination, and probably unconstitutional. The bill provides that if a complainant can prove that reporting an unlawful or unsafe practice was a "factor," however minor, in a discharge or other act of discrimination, the employer would have the almost insurmountable burden of proving, by clear and convincing evidence, that the discharge or discrimination would have taken place without the whistleblowing. This provision would have the practical effect of forever prohibiting the discharge of an employee who reports an unsafe or unlawful practice.

It is improper to place any burden of proof on a defendant or respondent. The bill magnifies that impropriety by requiring employers to satisfy a higher "clear and convincing" standard of proof, while simply requiring complainants to prove, by a mere preponderance of the evidence, that they were victims of discrimination.

Congress, the courts, and the Federal agencies have devised more appropriate proof allocations for claims of unlawful job discrimination which satisfy the U.S. Constitution and do not place excessive burdens on defendants. For example, Title VII of the Civil Rights Act of 1964 and the National Labor Relations Act place the burden of proof on the person alleging discrimination. Under those laws, discrimination victims are protected, yet employers are not unfairly handicapped because of an inappropriate allocation of the burden of proof.

NBC has the same concerns with Sections 5(c)(2) and 5(d)(4), which provide for interim relief in the form of reinstatement while a complaint is pending, and Section 5(k), which provides that a petition for review in a court of appeals will not stay an order of the Department of Labor. Those provisions, like the allocation of burdens of proof in the bill, presume the employer's guilt.

Finally, the remedies provided in the bill are excessive, unpredictable, and unnecessary to protect the interests of workers. Section 5(i)(1)(C) would allow an injured person to recover "compensatory damages" in addition to equitable relief. The bill does not attempt to define what compensatory damages are, but they apparently include relief other than back pay and lost benefits, which are specifically recoverable under other provisions in the bill. The provision for compensatory damages greatly concerns NBC, as courts could stretch that term to include mental distress, punitive damages, and other forms of relief not contemplated by Congress. As with many other provisions of the bill, the allowance of compensatory damages is not necessary to protect the interests of workers. Congress has found equitable relief to be adequate under Title VII, the National Labor Relations Act, and other laws, and NBC submits that there is no need for additional relief under this bill.

NBC thanks the Chairman and the Subcommittee for allowing it the opportunity to submit the above comments.

U.S. Chamber of Commerce

1615 H Street, N.W.
Washington, D.C. 20062
202/463-5602

March 14, 1989

Albert D. Bourland
Vice President
Congressional Relations

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Labor
Senate Committee on Labor and Human Resources
Washington, D.C. 20510

Dear Mr. Chairman:

The U.S. Chamber of Commerce, the world's largest federation of businesses, chambers of commerce and trade and professional associations, offers its views on your bill S. 436, the "Employee Health and Safety Whistleblower Protection Act."

Private-sector employees should be able to report unlawful or hazardous activities that endanger public health or safety without fear of personal reprisal, and many industries have structured reporting programs that give full and fair hearings to such allegations. Unfortunately, S. 436 fails to recognize these in-house reporting practices and procedures. However, they should not be bypassed in the interest of expediency.

Further, there are issues here that the Chamber believes should be examined carefully in the context of this legislation.

- Employers, who are in the best position to eliminate safety and health hazards that occur in the workplace, should have an opportunity to do so prior to allowing a disgruntled employee to bring an action to remedy a hazard. The Chamber believes that S. 436 should encourage the use of existing internal controls first and, if necessary, then allow the employee to appeal to the Regional Director of the Department of Labor. Many complaints are of a local nature; and a Regional Director, who may be more familiar with an issue than the Assistant Secretary, could expedite resolution of a complaint.

- S. 436 would not prevent frivolous claims or accusations against innocent companies or individuals. Moreover, it would not deter disgruntled employees from filing false claims, nor would it provide for penalties or sanctions against employees making such assertions. The Chamber believes that S. 436 should encourage the regulatory authority to consider during its deliberations balancing the seriousness of the complaint against the disruptive effect on the administrative operation of the company.

- o S. 436 would shift all of the burden and risk to the defendant. A small business, in particular, is vulnerable to disgruntled employees, who by falsely alleging unlawful or hazardous activity could grant themselves tenure and complete protection from disciplinary action. Furthermore, a company could incur substantial expense and injury to its reputation while defending unmeritorious charges. At a minimum, S. 436 should provide for the recovery of costs and attorneys' fees incurred by the wrongfully accused.

- o The Chamber agrees that private-sector employees should be able to report unlawful or hazardous activity in the workplace without fear of reprisal. However, any legislative solution to this problem should not only apply to the private sector but also should include federal employees.

- o The Chamber strongly believes that the whistleblower protections afforded to the private-sector employee by this bill should not be applicable if the employee knowingly participated in the unlawful or hazardous activity or could have prevented that activity from occurring.

- o Finally, the term "employee," defined in section 3(2) as "any individual who is employed by an employer or who is a former employee of an employer," is much too broad. Anyone, including unemployed applicants for employment, could argue that section 3(2) applies. S. 436 would also offer the rejected applicant a convenient means of retribution against an innocent employer.

The Chamber is concerned about the complexities of S. 436 and requests that they be comprehensively reviewed prior to further consideration of this legislation.

The Chamber requests that this letter be made a part of the hearing record on S. 436.

Sincerely,

Albert D. Bourland

cc: Members of the Subcommittee on Labor
James J. Brudney, Majority Counsel
Mark Powden, Minority Counsel

STATEMENT OF
WILLIAM L. SCHERI
AIRLINE COORDINATOR
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS
BEFORE THE SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
MARCH 7, 1989

Dear Mr. Chairman and Members of the Subcommittee:

My name is William L. Scheri. I am the Airline Coordinator for the International Association of Machinists and Aerospace Workers ("IAM"). The IAM represents 801,457 members in a variety of industries throughout this nation. We are the largest union in the air transport industry, representing 93,935 employees in virtually every craft and class. This union is deeply committed to safety in the airline industry and in protecting our members who cooperate with governmental agencies in reporting maintenance problems and instances where the safety margin on a particular aircraft is compromised. The IAM welcomes this opportunity to state our reasons for supporting Senator Metzenbaum's legislation, S436 -- The Employee Health and Safety Whistleblower Protection Act.

As a threshold matter, it is clear to those IAM members who repair aircraft that the cost-cutting marathon which the aviation industry has entered since deregulation has had a dramatic impact on aviation safety. The industry's reorganization into the hub and spoke system has meant frantic scheduling with fewer mechanics and less servicing for more planes (an increase of one-third since

1978). Even in those rare instances where the time, personnel and parts required to repair a particular problem are present, management will still often defer needed repairs. Time spent on repairs is treated as lost money. Given the hub and spoke system's demand for aircraft usage and quick turnaround time, numerous repairs are frequently delayed. Pressure has been brought about by an industry striving to maintain an on-time flight schedule and at the same time accomplish needed maintenance. Mechanics can attempt to report trouble on items having an impact on airworthiness or on deferable items which are left open too long but they are regularly overruled by their supervisors and are all too often threatened by management in order to get the planes in the air on schedule.

Unfortunately, on-time departures are virtually the only yardstick management uses to measure a maintenance foreman or mechanic's performance. Carriers often base supervisor's pay, benefits and compensation time upon on-time performance. The haste encouraged by the hub and spoke system has led to abuses of a foremen's power to "sign off" or "pencil whip" items in need of repair. Airframe & Powerplant ("A&P") mechanics are required by Federal Aviation Association ("FAA") regulations to signify if a particular function or repair has been completed by signing his name on the aircraft maintenance log/performance report. Foremen, in their attempt to accelerate the pace of maintenance, have taken to frequently initialling log performance reports when IAM A&P mechanics refuse to release an aircraft with uncorrected problems.

These items subsequently go without repair for weeks at a time. This is particularly shocking at a time when older planes, which require more frequent maintenance to remain airworthy, comprise an increasingly greater percentage of the carriers' domestic fleet (22% are more than 20 years old and 41% are between 10 and 19 years old).

One must ask where the FAA has been while such aviation maintenance abuses are taking place. Such abuses threaten the safety of the travelling public. We are concerned when the FAA must fine Pan American ($1.95 million), Eastern ($9.5 million in 1986), and, last month, Northwest (over $800,000) for safety violations. Unfortunately, we believe the FAA inspection staff is seeing only the tip of the iceberg since the number of inspectors still woefully trails behind the industry's growth since deregulation. The ratio of inspectors to carriers in 1986 was approximately 1.6 inspectors per carrier, which is far below the 4.17 inspectors per carrier ratio enjoyed before deregulation in 1977. Even with recent increases in inspectors, the FAA's enforcement capabilities remain severely limited numerically and organizationally. Both a June 1987 General Accounting Office report and a July 1988 Office of Technology Assessment ("OTA") study have been highly critical of FAA oversight of airline maintenance. The OTA report concluded that, faced with budget pressures, the FAA "has been scrambling vainly to catch up with the industry."

Last year, John R. Lauber, a member of the National Transportation Safety Board, appeared before the House aviation subcommittee and stated that "[a] sufficient margin of safety in air carrier operations can only be achieved through effective surveillance by FAA inspectors." The IAM agrees with Mr. Lauber and strenuously asserts that such "effective surveillance" by the FAA of our increasingly aging carrier fleet can only be achieved when the men and women who turn the wrenches on the airplanes can be free to report violations and discrepancies without fear of reprisal. Today, our IAM-member employees face letters of reprimand, suspensions and even terminations for reporting safety violations to the FAA. Some company officials have unfairly and heavy handedly sought swift retribution against those who report infractions. Without the protection provided in Senator Metzenbaum's proposed legislation, the FAA will see its lifeline to several air carriers severed by the ax of immediate firings for responsible safety-conscious employees whose only "crime" is to have reported wrongdoing by their employer.

Nowhere has this corporate campaign of intimidation and scare tactics been more actively pursued than at Eastern Air Lines, a subsidiary of Texas Air Corporation. During a 1986 visit with Eastern Vice President of Line Maintenance Terry Reimer, IAM District 100 General Chairman Russ McGarry and Combined Shop Chairman Don Miller received the unvarnished management policy concerning worker contact with the FAA. Mr. Reimer stated that if he found out that any mechanic went to the FAA for anything, he would have that mechanic fired. See Exhibit A. This attitude appears to pervade Eastern management from top to bottom. In a conversation with an IAM mechanic, Eastern Air Lines Vice President for Aircraft Maintenance Phil Anson referred to people who called the FAA as "slime" and speculated as to how they might come to a violent end. See Exhibit B. He also stated that the FAA "slime" were going to get the other mechanics "into trouble."

It is tragic that the imposition of significant fines by the FAA, lost air time to perform needed repairs, and the public reaction to revelations about Eastern's poor safety practices have resulted in a concerted effort by Eastern management to discourage FAA contact. Eastern management cannot be faulted for wanting to avoid FAA scrutiny given the numerous past instances where their policies have resulted in severe FAA criticism. A three-week special inspection in June 1987 and the FAA's 1988 follow-up study to its 1985 inspection were critical of Eastern's deferred maintenance program and noted recurring problems with certain equipment. The June 1987 FAA team said employees were forced to report problems numerous times before the proper maintenance was performed. One inspector in particular accused "maintenance personnel [of] placing departure schedules ahead of following proper maintenance procedures to assure aircraft reliability." See Exhibit C. Eastern Airlines encourages such attitudes by paying bonuses to maintenance supervisors based upon on-time performance.

Last spring's FAA 30-day inspection of Eastern was brought on, in part, by a letter to Eastern from Ron Harding, Acting Regional Counsel in the FAA's Southern Region. He proposed a $823,000 fine after detailing a number of charges that Eastern had violated regulations by allowing aircraft to fly in an unairworthy condition. He reported that the carrier had operated a 757 without first obtaining an airworthiness release from Eastern maintenance personnel. Indeed, former FAA Administrator McArtor further emphasized the necessity for a safety inspection of Eastern because of "the continuing pattern of fines, safety violations and apparent insensitivity of some of Eastern's officials." See Exhibit D.

While the FAA may characterize Eastern's safety problems as "insensitivity," our members would describe it as outright hostility in dealing with those it suspects of communicating with the FAA. A number of IAM members whose reports to the FAA have been of material assistance to that Agency's investigations have suffered suspensions and terminations. The names of those making safety reports to the FAA are frequently revealed to the company despite the FAA's promise of anonymity.

This is particularly true of workers who call the FAA's hotline (a toll free number) to report violations. This system is unsatisfactory because it takes too long to respond (10 days on average) and cannot protect callers from harassment. Our union representatives have been told that the system has many holes and leaks, and that Eastern's management could probably find out about the report and cover up the violation before the FAA could act. Even anonymous reports to the FAA can be detected by Eastern management by determining which mechanics work which aircraft.

Eastern's efforts to discourage candid discussions between FAA personnel and IAM mechanics reached a fever pitch during the April 1988 FAA investigation. For the duration of the inspection, management instituted restrictive policies for personnel regarding on-site FAA visits. I have included in Exhibit E a letter forwarded to me by Duane Thrasher, District Lodge 100 representative to the IAM's Permanent FAA Committee, and written by an Eastern manager establishing the use of an FAA activity report as of April 15, 1988. The letter required everyone in his department to document on a form any communication they had with an FAA inspector during the 30-day ramp inspection of Eastern aircraft. Exhibit E also contains earlier instructions to Eastern's planning personnel regarding the recording of any contacts with the FAA. With such restrictions placed upon our employees, it is little wonder that the final DOT report was, in fact, only a whitewash. It is also not surprising that last December, four of the planes inspected by the FAA in April and May were grounded with cracks or corrosion on their fuselage, one after an emergency landing.

Both before and since the spring inspections, mechanics at Eastern have been threatened with termination and in some cases actually fired when management determined that the FAA had been notified. The notice of termination for a Kansas City Eastern mechanic, Ron Adams, suggests that he was discharged after he notified the FAA about a logbook item upon which an Eastern manager had signed off. See Exhibit F.

Similarly, on November 2, 1987, Kansas City Eastern mechanic Steve Posner received a letter of reprimand and a subsequent letter of termination. Mr. Posner, a 19-year Eastern mechanic with 25 letters of commendation to his credit, acted upon the guidelines placed in the Maintenance and Engineering General Manual (The Repeater Program) and was fired for incurring a 75-minute delay. Supporting documents on Eastern Aircraft 801 and its history of number 5 leading edge flap problems are located in Exhibit G. Equally important, Posner's termination, unlike his earlier reprimand, highlighted FAA involvement in the incident and implies that Posner is responsible for the FAA's intervention.

As the Posner case indicates, unscrupulous carrier officials who terminate workers because they assist the FAA attempt to conceal their true motives for the termination. Typically, some pretextual grounds for the termination is cited. On September 18, 1987, for example, mechanic Jeff McNary's employment was terminated in Kansas City for supposedly failing to properly lead and direct his crew during a windshield replacement. See Exhibit H. In fact, there were no management personnel on the field and he was monitoring the situation as best he could in accordance with his responsibilities as lead mechanic. Aside from listing this alleged justification for the termination, Eastern also noted as a further ground for termination that Mr. McNary had "encouraged mechanics in Seattle to report safety or procedural violations by Eastern management to the FAA." In fact, Mr. McNary was suspended for ten days in 1987 for posting the FAA hotline number.

The case of Mr. William Heffernan further reveals a pattern of discouraging cooperation with the FAA at all costs. Mr. Heffernan, an IAM mechanic with 15 years of experience, was fired for correctly entering maintenance discrepancies in the aircraft maintenance logbook, thereby causing a delay while repairs were being made. I include with my testimony a copy of his termination letter from Eastern, which briefly states that he violated company rules and regulations by entering maintenance discrepancies in the aircraft maintenance logbook. See Exhibit I.

The discrepancies that he entered in the logbook were legitimate and affected the airworthiness of the aircraft. In his termination letter, Eastern claims that the discrepancies were not urgent nor a threat to the safety or airworthiness of the aircraft. I have attached as Exhibit J a copy of the Boeing 727 Aircraft Maintenance Manual which plainly shows that the placards he wrote up were FAA-required. An aircraft is not airworthy if it is missing any FAA-required items.

In fact, the spring 1988 FAA inspection of Eastern caused aircraft to be delayed for similar maintenance discrepancies. Why should a mechanic be fired for doing the same thing the FAA inspectors were required to do during the special inspection? Are they not both complying with Federal Aviation Regulations and FAA approved maintenance procedures?

The reality is that Mr. Heffernan was fired because he reported improper Eastern maintenance practices to the FAA. His letter of termination fails to mention that Eastern knew he had been in contact with the FAA regarding foremen signing off on inspections they did not conduct and that he had been seen talking to FAA inspectors. At the time, Heffernan was questioning Eastern's recent actions and attempting to determine how Eastern could justify the way it was getting around the FAA's requirements with regard to Category III, Autoland Inspections. The maintenance personnel accomplishing such inspections are required to be certified. Because Eastern still had not accomplished the required training to certify these mechanics, maintenance foremen were signing off the completion of such work when, in fact, they did not conduct the inspection. Uncertified mechanics were performing the actual work, contrary to the FAA's requirements. Eastern knew Mr. Heffernan was unhappy with its decision and that he was in contact with the FAA. The IAM submits that Mr. Heffernan was a victim of a company making an example of a mechanic who refused to look the other way.

Most recently, an Eastern mechanic in Atlanta, Joseph Hudack, twice contacted the FAA hotline to report his foreman, Larry Warren, for ordering him to make an improper repair to a DC-9 aircraft in the interest of getting the plane moving quickly. Mr. Warren also made an entry in the aircraft's maintenance log which described a repair different from the one that was actually made. Two days after Hudak's initial contact with the FAA, another Eastern foreman informed him that Mr. Warren knew of his conversation with the FAA and was "going to fire [his] ass." See Exhibit K.

Within two weeks of this conversation, Hudack was placed on ten days unpaid leave by Warren in a supposedly unrelated incident. In Warren's letter to Hudak regarding the suspension, the Eastern foreman threatened that "any other action by [Hudak] to disrupt the safe, on-time departure of Eastern flights will result in [his] termination." Only after Mr. Hudak's story was about to be published in the Wall Street Journal last June was his suspension rescinded. The FAA has subsequently proposed revoking Mr. Warren's mechanic's license for actions in this case.

Justice is harder to come by for similarly persecuted Eastern workers who do not have the power of the press on their side. The IAM is fighting their suspensions and terminations through the grievance process. Unfortunately, these unjust actions can often take years to arbitrate. Indeed, the total number of grievances, terminations and discipline cases submitted to the IAM District Lodge 100 System Board of Adjustment last year is ten times the number submitted in 1985, the year before Mr. Lorenzo took over the company. More than 4000 grievances were filed against Eastern during 1988. Even assuming the current strike had not taken place, this incredible backlog would keep cases like that of Messrs. McNary, Adams and Posner from being heard until two years after their firings. By clogging the grievance process and firing employees accused of reporting safety problems to the FAA, Eastern has attempted to suppress the truth through brutal intimidation tactics.

CONCLUSION

Few today would dispute that because of constraints brought about by the hub and spoke system, excessive pressure has been applied to employees to rush aircraft into the air. And few would dispute the willingness of some carriers to sacrifice safety in order to achieve on-time performance. We have not experienced a greater deterioration in safety because of the IAM mechanic work force whose union contracts give them the security to resist their employers' pressure to cut corners. Whenever our mechanics see any airworthiness or equipment problems, they report such problems to the carrier and will not release the aircraft involved until they are corrected. Mechanics and other employees, however, should not be disciplined and fired for fulfilling their obligation to the flying public. Mechanics who report violations of FAA regulations to federal agencies should be protected and encouraged rather than punished. The FAA must continue to rely on those in the best position to observe safety problems -- airline employees. In this regard, we are greatly concerned for the safety of the travelling public, for it must be remembered that we, our wives, families and our friends fly on these planes.

With this in mind, the IAM strongly endorses the "whistleblower" legislation, S436, sponsored by Senator Metzenbaum. The Employee Health and Safety Whistleblower Protection Act offers protection to workers in industries such as aviation which currently have no statutory remedy against reprisal. In particular, it creates a uniform 180-day statute of limitations for filing health and safety whistleblower complaints, adds teeth to the Department of Labor's investigations by granting its Secretary subpoena power, and ensures FAA involvement in aviation cases by referring the safety issues identified by the whistleblowers to the appropriate federal agency for future investigation. The bill thus represents a modicum of protection for our workers which will permit the free flow of critical safety information without fear of reprisal.

(Editor's Note: Due to printing limitations, and in the interest of economy, the exhibits accompanying this statement were retained in the files of the committee where they may be researched upon request.)

MANUFACTURING
CREATES
AMERICA'S
STRENGTH

TESTIMONY OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS

BEFORE THE SENATE LABOR AND HUMAN RESOURCES

SUBCOMMITTEE ON LABOR

MARCH 7, 1989

National Association of Manufacturers
1331 Pennsylvania Avenue, NW, Suite 1500 — North Lobby
Washington, DC 20004-1703 (202) 637-3000

Executive Summary

The proponents of the "Employee Health and Safety Whistleblower Protection Act," S. 436, state that the bill is intended to fill the existing gaps in whistleblower protection for those workers who currently do not have such protection, to provide a uniform statute of limitations and to vest the Secretary of Labor with subpoena power. A close reading of the bill, however, indicates that its scope is much broader.

First, the NAM questions whether such a comprehensive and complicated bill is necessary. Sixteen whistleblower laws are already in effect. If the purpose of the bill is to close the gaps in worker protection, rather than potentially disrupting the existing employee protections, it may make more sense to consider individual whisteblower bills specifically for those few industries still unprotected.

Assuming, arguendo, that such a comprehensive approach is required, the NAM has several concerns with the legislation as drafted. First, it is unclear how this bill will interact with existing whistleblower statutes. Rather than simply gap filling, the bill appears to be granting additional rights and remedies under existing laws and creating unnecessary dual enforcement mechanisms.

Second, the initial stage of the complaint investigation under the bill, which allows the Department of Labor investigation unit to order preliminary relief, including reinstatement, does not allow the employer the opportunity to respond to the charges filed against it and thus the bill fails to provide the minimum Fifth Amendment due process protection mandated by the Supreme Court of the United States. Morevoer, following the finding of reasonable cause by the investigtion unit, the evidentiary hearing shall be conducted and completed within 180 days of the receipt of the request for a hearing. This lengthy period prior to the holding of a hearing is not consistent with the requirement for "expeditious review" also cited by the Supreme Court.

Finally, the "right to refuse" provision, which gives a worker the right not to work if he has a "reasonable apprehension of serious injury to him, to other employees or to the public," is so broad and vague that it could easily be used by recalcitrant employees to disrupt the workplace. Reasonable and sufficient protection for "whistleblowers" can be provided without the use of this over-inclusive provision.

The NAM recommends that the legislation be closely reviewed to determine if it is necessary. If the legislation is needed, the bill should be amended to provide a more reasonable approach for both employers and employees.

TESTIMONY OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS
BEFORE THE SENATE LABOR AND HUMAN RESOURCES SUBCOMMITTEE
ON LABOR
March 7, 1989

I. INTRODUCTION.

The National Association of Manufacturers (NAM) believes that employers are responsible for providing a safe and healthful work environment and conducting effective occupational safety and health programs. These programs are essential to good employee relations and sound business practices. Employers must take the initiative in maintaining and utilizing their authority and freedom for action and decision to fulfill these responsibilities. Employees also should share in the responsibilities of maintaining a safe and healthful workplace by adhering to the safety and health workplace requirements and by reporting to the employer any observed safety and health workplace problems so that they may be quickly and efficiently remedied. Only through such efforts can a fully effective health and safety program be maintained.

The NAM recognizes that in some cases employees may not be content to simply report a health and safety violation to the employer and may feel compelled to report the violation to a federal agency. The NAM also acknowledges that those employees who in good faith report an unlawful activity deserve protection from retaliatory acts.

Although the NAM agrees with the concept behind S. 436, the "Employee Health and Safety Whistleblower Protection Act" ("the Act"), the NAM has several questions and concerns about the Act.

First, the NAM questions whether this bill is actually needed, or whether a more narrow approach to fill any gaps in existing protection might be more appropriate. Second, the NAM asks for clarification on how this bill will interact with existing whistleblower statutes. Third, the NAM is concerned with the scope of authority given to the Department of Labor's investigatory unit in the initial stages of the complaint investigation and how that authority may deprive the employer of its Fifth Amendment due process rights. Finally, the NAM is concerned that the scope of the protected employee conduct under the Act is so broad that it could be easily abused by a recalcitrant employee.

II. IS THE ACT NECESSARY?

The stated purpose of the Act is to "strengthen and improve protection for employees who report unlawful or hazardous activities, to prevent retaliation against employees, and to improve the health and safety of workers and the general public...." Sec. 2(b). Proponents of the Act state that the bill will "clos[e] existing gaps in coverage so that workers in all industries...will have some protection." 135 Cong. Rec. S1649 (Feb. 23, 1989). There are, however, already sixteen federal whistleblower provisions that protect employees against discrimination for reporting violations of specific health and safety laws. Moreover, contrary to Senator Metzenbaum's statement, the Act does not "merely provid[e] whistleblowers who have been left out in the cold a federal statutory remedy patterned after current law." Id. Rather, the Act takes the most comprehensive provisions from the existing whistleblower laws and creates a complicated new enforcement mechanism. In addition, the Act appears to provide additional rights and remedies to employees already covered by existing law, thus creating potential duplication and confusion. (See section III below.)

In light of the broad protections that already exist under current law, the NAM questions whether such a complicated and comprehensive approach is required to simply close the existing gaps in coverage. Would it not be simpler to implement whistleblower laws for those areas that are not already covered rather than creating the kind of confusion as to coverage and implementation that will inevitably arise from the proposed Act?

III. HOW IS THIS LAW INTENDED TO INTERACT WITH EXISTING WHISTLEBLOWER LAWS?

Section 8(a) of the Act provides that "it is the express intent of Congress to supersede an existing Federal whistleblower protection law only insofar as such law -- (1) may provide a statute of limitations for filing complaints that is less than 180 days; and (2) does not authorize subpoena power for the Secretary as provided in section 5(f)." An earlier draft of this legislation contained a third subsection which was deleted from the final version which provided that the Act would also supersede existing whistleblower statutes when they did "not authorize a private right of action...."

Despite the explicit limited areas of preemption of existing whistleblower bills, a close reading of the Act results in some confusion over how S. 436 is intended to interact with existing whistleblower laws. Conceivably, in operation, S. 436 could go beyond its expressed scope and disrupt existing whistleblower protections.

The following hypothetical illustrates this potential confusion. The Occupational Safety and Health Act of 1970 (OSH Act) provides whistleblower protection for an employee who files a complaint, institutes a proceeding, testifies in a proceeding, or exercises other rights provided under the OSH Act. 29 USC Sec. 660(c). OSHA regulations also allow an employee to refuse to work in situations of imminent danger.

An OSHA-covered employee who walks off the job in a non-emergency situation is not protected by the OSHA whistleblower provision. Cf. Whirlpool Corporation v. Marshall, 445 U.S. 1 (1980). As a result, this employee does not have an existing remedy. The lack of remedy causes the employee to fall within the definition of "employee" under Section 3(2) in S. 436. If the employee is discharged or discriminated against for his refusal to work, the employee could file a complaint under the provisions of S. 436. Under this scenario, S. 436 would create new rights and remedies for workers that are not available under the OSH Act.

Moreover, under the S. 436 procedure, if the administrative law judge does not act in a timely basis, the employee would be vested with the right to file a private action. This result is contrary to the drafters' apparent intention not to extend the private right of action to areas that are already covered by whistleblower laws.

In addition, under this reading of the legislation, the Act could create an independent procedure for investigating and adjudicating alleged OSHA violations. For example, as described above, if an employee refuses to work, claiming that it would involve participation in an activity which violates an OSHA regulation, and the employee is disciplined or discharged, the employee would not have relief under the OSHA whistleblower provision, but may have relief under S. 436. If the employee brings an action under S. 436, the key issue would be whether an

OSHA violation in fact occurred. Under these circumstances, the determination of an OSHA violation would be litigated through the administrative procedure created by S. 436, and not before the Occupational Safety and Health Review Commission (OSHRC) as the OSH Act provides, thus creating an unnecessary dual enforcement scheme.

Such a broad reading and application of S. 436 could affect not only situations involving alleged OSHA violations, but also other existing "whistleblower" statutes. The NAM hopes that the drafters of S. 436 did not intend the legislation to have such a broad scope. It makes no sense to disrupt currently effective whistleblower provisions and procedures or to alter the rights and remedies under those provisions which were considered and provided for by Congress. At the very least, further clarification is necessary as to how S. 436's drafters envisioned the bill interacting with existing whistleblower provisions.

IV. DOES THE INVESTIGATORY PROCEDURE UNDER S. 436 VIOLATE THE FIFTH AMENDMENT DUE PROCESS CLAUSE?

Under S. 436, the investigation office to be established within the Department of Labor has the authority to issue a preliminary order providing for relief including immediate reinstatement and compensatory damages prior to the holding of an evidentiary hearing. Sec. 5(c)(2). The employer's request for a hearing will not stay the order. Sec. 5(d)(4). Thus, an employer would be required to reinstate a discharged employee at full pay until the final order is issued by the Secretary of Labor. The bill does not provide a procedure for recovery of the back pay if the employer is ultimately successful.

Following the findings of the investigation office and the issuing of the preliminary order providing relief, the complainant or the respondent may request a hearing before an administrative law judge within 30 days of receipt of the findings or order. Sec. 5(d)(1). A hearing shall be conducted and completed within 180 days of receipt of the request for the hearing. Sec. 5(e)(1).

The authority of the investigation office to issue a preliminary order providing relief before the employer has had an opportunity to respond to the employee's complaint raises constitutional due process questions. In other words, does the imposition of relief prior to the employer's ability to defend its actions deprive the employer of procedural due process under the Fifth Amendment to the United States Constitution?

This issue was reviewed by the United States Supreme Court in Brock v. Roadway Express, Inc., 107 S. Ct. 1740 (1987). In Roadway Express, the Court examined the procedure set forth in the whistleblower provision of the Surface Transportation Assistance Act (the Surface Transportation Act), 49 U.S.C. Sec. 2305. Like S. 436, the Surface Transportation Act allows an investigatory office within the Department of Labor to issue relief, including reinstatement and compensatory damages, before the employer is given an opportunity to respond to the complaint. Regulations implemented under the Surface Transportation Act require that a hearing be held within 30 days after an employer files objections to a preliminary reinstatement order, unless the employer and employee otherwise agree or good cause is shown. 29 C.F.R. Sec. 1978.106([illegible]).

In a closely divided [illegible] the Court concluded that a full evidentiary hearing was not required under the Due Process Clause. The Court, however, did agree that the provision was unconstitutional to the extent that it did not provide notice to the employer of the charges and that it did not allow the employer an opportunity to respond to the charges prior to being ordered to temporarily reinstate the employee. Minimum due process for the employer, the Court stated, requires notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses as well as complete and expeditious postreinstatement review. 107 S. Ct. at ___, 95 L. Ed. 2d at 251 & 253-54.

On its face, S. 436 does not comport with this due process standard. The bill provides that a copy of the complaint shall be served on the respondent. Sec. 5(b)(2). The bill then requires that prior to issuing relief, the "investigation office shall conduct an investigation, determine whether there is reasonable cause to believe the complaint has merit, and make findings of fact." Sec. 5(c)(2). Upon finding reasonable cause, the office is empowered to then issue relief, including the reinstatement of the employee pending a final order on the complaint. Sec. 5(c)(2). Nowhere does the bill allow the employer an opportunity to respond to the charges prior to being ordered to temporarily reinstate the employee.

Moreover, the Roadway Express Court noted the importance of an expeditious postreinstatement review in satisfying due process concerns. 107 S. Ct. at ___, 95 L. Ed. 2d at 253-54. Implementing regulations of the Surface Transportation Act provide that a hearing must be held within 30 days of the filing of an objection. 29 C.F.R. Sec. 1978.106(b). In contrast, S. 436 allows the hearing to be held anytime within 180 days from the time of the receipt of the hearing request.

Allowing approximately six months to lapse between the implementation of the preliminary order -- conceivably reinstatement -- and the time of the hearing is intolerable and certainly does not comport with the "expeditious postreinstatement review" required by the Court to satisfy due process concerns. Moreover, in a practical sense, allowing that much time to elapse before an employer is allowed to explain its actions is unfair and potentially extremely disruptive to the workplace.

The NAM strongly recommends that the 180 day time period be decreased to a more reasonable period. Moreover, in order to comport with Fifth Amendment due process rights, the NAM recommends that such safeguards as outlined in the Roadway Express decision be incorporated in the bill itself.

V. THE REFUSAL TO ACT PROVISION IS TOO BROAD.

S. 436 includes a broad provision granting employees the right to "refuse to participate in an activity, policy or practice" or, in other words, the right to refuse to work. Sec. 4(a)(3). The bill would protect any employee who refuses to work based on either (1) a violation of a federal health and safety law or (2) a reasonable belief that the potential for serious injury exists, as long as the employee, "where possible," previously requested the employer to correct the dangerous condition. Sec. 4(a)(3)(B)(iii).

This "right to refuse" concept is addressed directly only in the Federal Railroad Safety Act and the Surface Transportation Act, although the Labor Management Relations Act provides generally that a refusal to work under "abnormally dangerous conditions" will not be considered a strike. 29 C.F.R. Sec. 1977.12. A similar right under the Mine Safety and Health Act was created by court decisions after reviewing the legislative history.

The language of S. 436 is far broader than either the comparable OSHA regulation or the provision of the Federal Railroad Safety Act. An employee who refuses to work under the whistleblower protection sections of Railroad Safety Act and the OSHA regulation will be protected only if, in addition to the requirements enumerated in S. 436, the refusal is made in good faith, there is no reasonable alternative, there is imminent danger of death or serious injury, and there is insufficient time, due to the urgency of the situation, to eliminate the danger through the regular statutory channels.

In addition, unlike S. 436, the Federal Railroad Safety Act requires prior notice to the employer of the employee's intent to refuse to work. The Surface Transportation Act, moreover, provides that "[i]n order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition." 49 U.S.C. Sec. 2305(b)(emphasis added).

S. 436 does not provide anywhere near the same degree of safeguards; instead it only requires that "before refusing to participate, the employee, where possible, sought, and was unable to obtain, a correction of the dangerous activity, policy or practice." Sec. 4(a)(3)(B)(iii)(emphasis added). The "where possible" language is so vague and ambiguous that it offers no protection at all for employers from employees who could otherwise abuse this right to refuse provision.

Moreover, where participation allegedly constitutes a violation of a federal health or safety law, the bill does not require that the employee first notify the employer prior to refusing to work. Sec. 4(a)(3)(A). Consequently, the employer is given no opportunity to remedy the alleged problem before a potentially disruptive and costly work stoppage occurs. Such an approach is in no one's best interest.

In addition, S. 436 authorizes the refusal to work anytime participation would constitute "a violation" of federal health and safety law, with no distinction as to the nature or seriousness of a violation. Thus, even a minor, non-serious violation could trigger the refusal rights guaranteed by the bill. This could apply whether S. 436 is given a broad reading so that an employee's "participation" in an activity encompasses any workplace in which the employer may be violating the law or if S. 436 is interpreted more narrowly to protect only those employees who refuse to work when their own activity constitutes the violation.

Moreover, the bill legitimizes the refusal to work where the employee perceives a danger, even when the employer has not violated any health and safety law or regulation. Thus, the bill could shelter an employee who sees a danger where OSHA or other regulatory agencies do not. While the bill attempts to limit the scope of this provision by adopting an objective, "reasonable person" standard for determining whether the employee's fear is rational, such a standard would not be difficult to meet.

For example, if an employee were to read a study concerning a possible occupational disease that could be contracted from exposure to a substance that is in the workplace, that employee could claim that he or she has a reasonable apprehension of serious injury. Based upon this general apprehension, the employee could refuse to work. Any type of employer discipline could trigger a complaint under S. 436. Such a broad application of the bill could seriously disrupt workplaces around the country.

The NAM strongly urges that the right to refuse provision be deleted from the bill. At the very least, additional requirements must be added to make its scope and application reasonable and less vulnerable to abuse.

VII. CONCLUSION.

The proponents of S. 436 present the bill as one which merely "fills in the gaps" in existing federal whistleblower statutes. A close reading of the Act, however, leads to a very different conclusion. S. 436 takes the most comprehensive protections from each of the existing statutes and consolidates them into a complex enforcement scheme which culminates in a possible private right of action. Moreover, S. 436 conceivably could expand the coverage of the existing whistleblower laws far beyond their original scope as intended by Congress.

A more reasonable approach to this issue may be to establish whistleblower protections on an industry-by-industry basis where they do not currently exist. If such a new, complex and broad law is determined to be needed, however, the NAM strongly recommends that the safeguards and clarifications mentioned above, which are necessary to avoid unreasonable disruptions of the workplace and confusion in the application of this Act, be incorporated into the bill.

AMERICAN
MEAT
INSTITUTE
Serving The Meat Industry Since 1906

COMMENTS OF THE
AMERICAN MEAT INSTITUTE
on the
EMPLOYEE HEALTH AND SAFETY WHISTLEBLOWER PROTECTION ACT (S.436)

before the

SUBCOMMITTEE ON LABOR

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

March 21, 1989

Submitted by:

C. Manly Molpus
President and C.E.O.
AMERICAN MEAT INSTITUTE
1700 N. Moore St.
Arlington, VA 22209

Mr. Chairman:

We appreciate this opportunity to provide comments on behalf of the American Meat Institute (AMI) on S.436, the Employee Whistleblower Protection Act. AMI is the national, non-profit association representing the meat packing and processing industries. We currently have over 400 general members, who produce over 80% of the meat and meat food products sold in United States commerce. As a threshold matter, it appears from our review of the testimony of the Committee's March 7 hearing, that our industry has become one of the focal points of this legislation. Our critics have argued before this Committee that today's meat processing industry is posing substantial risks to the consumer, and that pending regulatory changes will serve to increase such risks. We must set the record straight on these points.

Today's meat packing and processing industry is the most intensely regulated component of the food supply and, indeed, of virtually the entire consumer products industry. Through such regulation, we find that over 99.5% of our product is inspected and passed for human consumption. While this is a record we are continuously working to improve, it is hardly the one which has been suggested by the sensationalistic, anecdotal, and unsubstantiated information which has been placed before this Committee to date.

It is equally misleading to suggest, as previous witnesses have done, that public health concerns in this area have been exacerbated by USDA's efforts, now underway, to implement certain provisions of the Processed Products Inspection and Improvement

Act of 1986. While this testimony is not the place in which to discuss the specifics of these provisions, the Committee should know that under this legislation, the Secretary of Agriculture enjoys greater flexibility to assign personnel in meat processing establishments based upon Congressionally prescribed criteria and is given additional enforcement authorities to carry out his duties under the Federal Meat Inspection Act (FMIA). Rather than establish the "industry inspection" system suggested by earlier witnesses, the law actually allows USDA to increase its intensity of inspection in establishments whose practices might generate legitimate public health concerns.

If enacted as written, S.436 would have a major impact across the broad spectrum of American industry. It is inaccurate and misleading to suggest that the legislation merely closes gaps in existing law. To the contrary, the bill in its present form would trigger a radical shift in employee/employer relationships.

SPECIFIC CONCERNS

AMI believes that a number of specific provisions of the legislation as currently proposed, including the following, deserve additional scrutiny:

- The bill fails to adequately define appropriate procedures for employee notification and employee-employer discussions of alleged health and safety violations before remedy is sought by administrative and judicial procedures.
- The legislation would create an entirely new private right of action in the health and safety area. Judicial relief could conceivably be sought

which is in addition to, or inconsistent with, that provided under other federal health and safety laws.

- The bill provides remedies in addition to those available under current law. One can envision judicial action under these provisions while related administrative efforts are underway to address the same problem. The bill would thus frustrate the general doctrine of exhaustion of administrative remedies and could clog the courts with unnecessary litigation.

- By providing for substantial damages for pain and suffering beyond those necessary to make a complainant whole or otherwise address legitimate public health concerns, the bill could encourage frivolous litigation.

- S.436 would provide a new right of refusal to work based upon mere "reasonable apprehension" of either personal or public health risk. This right would extend far beyond that which is currently available under similar laws and may authorize refusal to work without resorting to appropriate statutory channels, even where perceived dangers are not immediate.

- Under the legislation, employers are saddled with unfair burdens of proof. At a hearing, if a complainant establishes by a mere preponderance of the evidence that a protected activity was a factor in an alleged violation, the burden then shifts to the employer to establish by the much stricter standard of "clear and convincing" evidence that the action complained of would have occurred even if the employee had not engaged in the protected activity. This shifting of burden raises fundamental fairness questions.

- S.436 would establish a uniform investigatory procedure within the Department of Labor. Under its terms, such investigations would extend to allegations of both private and public health risk. Apparently, under the legislation, a whistleblower complaint could trigger an investigation by some newly established bureaucracy at the Department of Labor, even while USDA is maintaining a continual inspection presence at the facility with both the expertise and the statutory mandate to address all issues of legitimate public health concern. The potential for waste and inefficiency is obvious, and the overlap of jurisdictions would create a judicial and administrative nightmare.

- A number of state courts and legislatures have embraced the concept of public policy discharge, and have provided protection for employees who raise legitimate questions about corporate health and safety practices. Congress should be wary of establishing broad and intrusive federal statutory and bureaucratic requirements unless the compelling need has been demonstrated.

CONCLUSION

For reasons discussed above, AMI has fundamental reservations regarding S.436. We remain, however, open to further discussions regarding efforts to provide appropriate protection for whistleblowers. Proponents of this particular proposal have suggested that it is necessary to fill gaps in current statutory schemes. If such gaps need to be filled, a more balanced and targeted approach to address them would seem more appropriate. The arguable existence of such gaps should not, however, create a need for sweeping legislative change of this sort which would create substantial new bureaucracies, potentially clog courts with a new wave of litigation, and fundamentally alter the employer/employee relationship in our industry.

Finally, in light of the wide-ranging ramifications of this proposal, further hearings would seem imperative. Sponsors of the legislation have proposed a sweeping change in employee/employer relations, and given the legal complexities, statutory conflicts, and jurisdictional overlap outlined above, we should not be traveling down a fast-track road to hasty passage of S.436.

We appreciate your consideration of our views.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
CHAUFFEURS • WAREHOUSEMEN & HELPERS
OF AMERICA
25 LOUISIANA AVENUE, N.W. • WASHINGTON, D.C. 20001

March 1, 1989

The Honorable Howard M. Metzenbaum
Chairman, Subcommittee on Labor
United States Senate
140 Senate Russell Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The International Brotherhood of Teamsters, representing nearly two million workers, strongly endorses your bill, the Employee Health and Safety Whistleblower Protection Act. As you are aware, your legislation has many features that are similar to the Section 405 protections of the Surface Transportation Act of 1982 (P.L. 97-484), which extends the protection of the Secretary of Labor to employees in the motor carrier and bus industries who are discharged for reporting safety and health problems.

While popularly referred to as "whistleblower protections", your legislation would also protect workers who refuse to participate in violations of law or who refuse to subject themselves or the general public to serious danger. The reality of the American workplace requires this protection, in addition to, the protection for reporting safety and health violations to government officials.

While we are pleased to have this type of protection for our members in the motor carrier industry, thousands of Teamster members in airlines, manufacturing, construction and other industries need the same protection now enjoyed by their fellow union members. I am enclosing for your review a copy of a federal law suit filed by a Teamster member who was fired for reporting safety violations. As you can see from the court's decision, the judge laments that the worker has no legal recourse because Congress has not acted to extend this protection to them.

A very important element of the Employee Health and Safety Whistleblower Protection Act is the interim reinstatement of employee provisions. This section, modeled after the protections in Section 405 of the Surface Transportation and Assistance Act of 1982, requires the interim reinstatement of an employee based on an initial finding of unlawful discharge or discrimination for reporting a safety violation. Just as "Justice delayed is Justice denied", a worker illegally deprived of his job in this kind of situation can never really be made whole for the stigma, the stress, and the economic hardships that can result. Prompt reinstatement is essential for effective worker protection. The U.S. Supreme Court has reviewed the interim reinstatement provision of Section 405 and has specifically found it to be constitutional. (See Roadway vs. Bellamy)

While we strongly endorse your legislation, I would like to point out some concerns that we have with this approach. As you may be aware, the Occupational Safety and Health Administration was recently criticized by the General Accounting Office for its dilatory approach to Section 405 investigations. G.A.O. found that O.S.H.A. exceeded the statutory time limits for investigations of worker complaints imposed by Section 405. While your bill adds a needed private right of action for whistleblowers, I would urge you to strengthen O.S.H.A.'s capacity to investigate these complaints in the time frame that Congress has mandated.

We would also recommend that a clearinghouse-type procedure be established so that a worker could simply file a discrimination complaint with O.S.H.A., and O.S.H.A. would be responsible for determining whether the complaint falls within the purview of your proposal or under other whistleblower protection laws. This would relieve the American worker of the burden of having to know what Federal law might protect them from discrimination.

We would also hope that the intent of Section 8(a) of the bill will make clear that this bill supplements other whistleblower legislation where present statute does not protect certain kinds of safety or health refusals or complaints.

Finally, I would suggest that the payment of legal and other costs of the victim of discrimination would be improved by following the example set under Section 405.

Senator, we would like to congratulate you and Senator Grassley on crafting a well thought-out, timely and needed piece of legislation.

The International Brotherhood of Teamsters stands ready to assist you so that your proposal will become law.

Sincerely,

David A. Sweeney

David A. Sweeney
Director
Department of Legislation

DAS:mw
Enclosure

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THOMAS RACHFORD,)
)
Plaintiff,)
)
v.) No. 84 C 3044
)
EVERGREEN INTERNATIONAL)
AIRLINES, INC., a)
corporation, and)
EVERGREEN INTERNATIONAL)
AVIATION, a corporation,) Before the Honorable
) George N. Leighton
Defendants.) U. S. District Judge

Memorandum

This cause is before the court on defendants' motion, pursuant to Rule 12(b)(6), Fed.R.Civ.P., to dismiss plaintiff's complaint. It is axiomatic that under this rule a complaint should be dismissed only if it appears *beyond doubt* that a plaintiff can prove no set of facts on which relief can be granted. *Hishon v. King & Spaulding*, 104 S.Ct. 2229, 2233 (1984). The facts, alleged by plaintiff, and taken as true for purposes of this motion, are as follows.

I

Plaintiff, Thomas Rachford, was formerly employed by Evergreen International Airlines as a flight engineer. He was an experienced aircraft mechanic and held a 727 Flight Engineer Rating, an Air Frame & Power Plant license, and a Flight Engineer license. In the course of performing maintenance tasks for the airline, plaintiff noted irregularities in Evergreen's operating procedures, including inattention to aircraft maintenance requirements imposed by Federal Aviation Administration (FAA) regulations which he brought to the attention of Penn Stohr, Evergreen's Vice President of Maintenance, at corporate headquarters in McMinnville, Oregon. Plaintiff also noticed that aircraft #864 consumed excessive oil and told Stohr of this problem on successive occasions. When plaintiff was on aircraft #864 on June 25. 1984, on a flight from Ontario, California to Newburgh, New York, the aircraft required oil during a stop at O'Hare airport; plaintiff warned two Evergreen employees that #864 would probably require shutdown due to the engine problem.

On June 26, 1984, the airline discharged plaintiff because he had informed the FAA about the excessive oil consumption of aircraft #864, and because of his excessive complaints to supervisors and other employees. Plaintiff, an Illinois citizen, then brought this action against defendants Evergreen International Airlines, Inc., and Evergreen International Aviation, Inc., Oregon corporations, invoking the court's diversity jurisdiction pursuant to 28 U.S.C. §1332, alleging wrongful discharge in violation of Illinois law, the Federal Aviation Act, 49 U.S.C. §§1421, 1425; and under the Railway Labor Act, 45 U.S.C. §§152, and 181, et seq.

II

Plaintiff's claim under Illinois law is based on the tort of retaliatory discharge, a cause of action available to an at will employee (as plaintiff was), when his termination is in violation of a public policy of the State of Illinois. Palmateer v. International Harvester Co., 85 Ill.2d 124, 421 N.E.2d 876 (1981); Kelsay v. Motorola, Inc., 74 Ill.2d 172, 384 N.E.2d 353 (1978). However, as defendants point out, this cause of action is a narrow exception to the usual Illinois rule that an employer may freely discharge an at will employee. To state a claim for retaliatory discharge, a plaintiff must allege that his termination contravenes a clear mandate of public policy of the state. Here, plaintiff does not rely on State of Illinois law, but on federal law in support of his claim; and thus, this court concludes that he has no viable state claim for wrongful discharge. *See Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984). While it is undoubtedly true, as plaintiff claims, that Illinois has a general policy in favor of aviation safety, the state has no interest in enforcing federal law, even if that federal law is incorporated, as plaintiff suggests, in the state's general public policy. *Id*. at 1475. Moreover, this court finds it difficult to discern why Illinois public policy would be implicated by the discharge of an employee of an Oregon corporation for *complaints* which occurred in Oregon regarding maintenance of aircraft which flew over the entire United States. Defendants' motion to dismiss Count I is therefore granted.

Plaintiff bases his claim in Count II on a right of action under the Federal Aviation Act. However, Congress did not expressly provide a right of action under that statute, nor does an implied right of action exist. Pavolini v. Bard Air Corp., 645 F.2d 144 (2d Cir. 1981). The relevant provisions of the act do not require an air carrier to continue to employ an employee, nor do they prohibit a carrier from discharging an employee for reporting safety violations; thus an action seeking redress for loss of employment does not flow from any statutory requirement or violation, and cannot be maintained. Id. at 147. Defendants' motion to dismiss Count II on this ground is granted.

In Count III, plaintiff alleges that his consultation with fellow employees and representation of their joint safety concerns to management constituted protected activity within the Railway Labor Act. However, that act does not cover concerted activities unrelated to union organizing. 45 U.S.C. §152, Fourth. See also Davin v. Delta Air Lines, Inc., 678 F.2d 567 (5th Cir. 1982). Because plaintiff states in his complaint, Count I, para. 10, that "at none of the times relevant herein did plaintiff belong to a labor organization," his claim under the Railway Act must fail. Defendants' motion to dismiss Count III is granted.

In light of the above, this court is forced to conclude that plaintiff has failed to state a claim on which relief can be granted, and that his remedy, if any, lies in the state courts of Illinois or, more plausibly, in the courts of Oregon. [redacted]s ~~[redacted]ps lamentable that one who "whistle blows" regarding such important matters as air safety should be discharged from his employment without a remedy under the Federal Aviation Act, Congress has not seen fit to protect employees from such retaliation~~. Until that time, a federal court can provide no recourse to an employee discharged for reporting violations of federal safety regulations. Pavolini v. Bard Air Corp., 645 F.2d at 148. Accordingly, defendants' motion to dismiss is granted, and this suit is dismissed in its entirety.

So ordered,

George N. Leighton

George N. Leighton
United States District Judge

Dated: OCT 26 1984

FOOD & ALLIED SERVICE TRADES
DEPARTMENT - AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS
815 Sixteenth Street, N.W., Suite 408 - Washington, D.C. 20006 (202) 737-7200

FAST
FOOD & ALLIED SERVICE TRADES

ROBERT F. HARBRANT
President
RHONDA L. HILYER
Secretary-Treasurer

February 28, 1989

Senator Howard Metzenbaum
U.S. Senate
140 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

Thank you for introducing S. 436, The Employee Health and Safety Whistle Blower Protection Act. It is essential that employees working in plants and factories across the country are given the protections that federal workers are given when they report unsafe and unlawful practices by their employers.

As you well know, many employers hinder the protection of the public health and safety by firing or reprimanding workers who report faulty products, contaminated meat products and other violations of the law. This practice must stop. The bill which you and Senator Grassley have introduced, has the teeth that will encourage workers to report unlawful practices without the fear of reprisal from their employer.

Clearly this is a nonpartisan issue. It advocates the protection of jobs while at the same time, ensuring that the public health and safety is maintained. It seems to me that I see a different article once a week that discusses meat covered with rat droppings or apple juice made of sugar water or products with false FDA certification. I believe this bill will help put an end to these intolerable occurrences because workers will be protected if they speak up and report their employers' injustices.

I commend you once again for introducing this vital piece of legislation.

Sincerely,

Robert F. Harbrant

Robert F. Harbrant
President

Vice Presidents
SAM H. BEGLER
JACK CAFFEY
FRANK W. CARTER
E. L. (VERA) CATALLI
JOHN DECONCINI
LARRY L. DUGAN, JR.
EDWARD T. HANLEY
LARRY R. JACKSON

MARION A. LEE
LENORE MILLER
JOSEPH M. MISBRENER
J. F. OTERO
SUSAN BIANCHI SAND
JOHN J. SWEENEY
ROSEMARY TRUMP
JAMES L. WALKER
WILLIAM H. WYNN

AFFILIATES: Bakery, Confectionery and Tobacco Workers International Union • Distillery, Wine and Allied Workers International Union • International Union of Operating Engineers • International Brotherhood of Firemen and Oilers • Association of Flight Attendants • Glass, Molders, Pottery, Plastics and Allied Workers International Union • American Federation of Grain Millers • Hotel Employees and Restaurant Employees International Union • Laundry and Dry Cleaning International Union • Oil, Chemical and Atomic Workers International Union • United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada • Transportation-Communications International Union • Retail, Wholesale and Department Store Union • Seafarers International Union of North America • Service Employees International Union • United Food and Commercial Workers International Union

LAW OFFICES
BISHOP, COOK, PURCELL & REYNOLDS
1400 L STREET, N.W.
WASHINGTON, D.C. 20005-3502
(202) 371-5700

WRITER'S DIRECT DIAL

TELEX 440574 INTLAW UI
TELECOPIER (202) 371-5950

March 17, 1989

The Honorable Howard Metzenbaum
Chairman, Subcommittee on Labor
Committee on Labor and Human Resources
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Attached please find material entitled: "Commentary on S.436." This Commentary has been prepared for review by the members of the Subcommittee on Labor and we respectfully request that it be made part of the official printed record of the hearing held on S.436 on March 7.

Sincerely,

Nicholas S. Reynolds

Nicholas S. Reynolds

LAW OFFICES
BISHOP, COOK, PURCELL & REYNOLDS
1400 L STREET, N.W.
WASHINGTON, D.C. 20005-3502
(202) 371-5700

WRITER'S DIRECT DIAL

TELEX 440574 INTLAW UI
TELECOPIER (202) 371-5950

COMMENTARY ON S.436

March 17, 1989

Nicholas S. Reynolds
Richard K. Walker

I. INTRODUCTION

These comments are submitted in response to the invitation of Senator Howard Metzenbaum, Chairman of the Labor Subcommittee of the Senate Labor and Human Resources Committee, to provide input on the provisions of proposed S.436, the "Employee Health and Safety Whistleblower Protection Act." The authors of these comments serve as counsel to nuclear power utilities and contractors before the Nuclear Regulatory Commission and the Department of Labor, and have handled numerous cases arising out of Section 210 of the Energy Reorganization Act. Further, the authors have provided advice and counsel to nuclear power utilities on the interrelationships between atomic energy law and labor law, and on the structuring of programs to encourage employees to report safety concerns to management with the assurance that no adverse employment action will occur.

The authors of these comments are grateful for the opportunity to address the proposed legislation. And we are especially pleased about comments made by both Chairman Metzenbaum and Senator Grassley at the hearing on S.436 on March 7, expressing their mutual desire to work with the business community to produce a fair bill that does not produce undue burdens. See The Daily Labor Report, No. 45 at A-6 (Mar. 9, 1989).

At the outset, we are heartened by the substantial improvement of S.436 in comparison to S.2095, a whistleblower protection bill introduced and on which we commented last year. In particular, we believe that the sponsors of S.436 have wisely refrained from attempting to modify existing, industry-specific whistleblower legislation in most significant respects. Nevertheless, S.436 leaves room for much improvement, and our objective in submitting the commentary that follows is to offer constructive criticism of the Bill, particularly as it is still intended to affect Section 210 jurisprudence, but also as it may affect industrial employers generally. We hope that these comments can assist the Subcommittee and other interested members of the Senate in crafting whistleblower protection legislation that is as balanced, equitable and effective as possible.

II. THE BILL APPROPRIATELY EXPRESSES A CONGRESSIONAL INTENT NOT TO MODIFY EXISTING FEDERAL WHISTLEBLOWER LEGISLATION, INCLUDING SECTION 210 OF THE ENERGY REORGANIZATION ACT, EXCEPT TO THE EXTENT SPECIFICALLY PROVIDED.

Over the course of the past two or three decades, Congress has seen fit to provide certain remedies to "whistleblowers" in a variety of specific contexts. The currently effective federal whistleblower protection statutes are for the most part incorporated into the substantive provisions of federal law regulating a particular industry (e.g., transportation, mining, nuclear power, etc.) or certain specific activities (e.g., pollution, handling toxic substance, etc.), and have been tailored by Congress to account for the particular concerns and interests prevailing in the specific regulatory context in which such protection has been accorded. While all current whistleblower provisions balance (1) the interest in protecting employees who take legitimate steps to avert employment-related dangers, (2) the employer's interest in maintaining a productive workforce and safe workplace, and (3) the public's interests in both safety and in obtaining the fruits of the employer's endeavors, the various provisions reflect an individualized accommodation of the peculiar interests and priorities of the particular industries and/or regulatory objectives involved.

Whistleblower legislation affecting the nuclear power industry exemplifies Congress' practice of tailoring whistleblower protections to a particular industry. Section 210 of the Energy Reorganization Act[1] takes into account the important safety interest, shared by both the public and employees seeking protection under that section, in ensuring the safe construction and operation of nuclear power plants in the private sector. That interest, of course, includes not only the concern that operations be conducted in accordance with applicable safety laws and regulations, but also the concern that employees at nuclear power plants are both capable of performing their operational duties and willing to adhere to federal safety

---

1/ 42 U.S.C. § 5851.

standards and appropriate management directives. In crafting and adopting Section 210, Congress has presumably taken into account these competing interests.

Section 8(a) of the Bill unmistakably expresses an intent to modify existing federal whistleblower legislation in only two specific respects. That section thus recognizes that existing whistleblower legislation takes into account the particular concerns and interests of the industries and regulatory contexts to which the various existing whistleblower provisions apply, and wisely refrains from attempting to modify existing whistleblower law in any unspecified manner.

A. The Bill's Provision Granting the Secretary of Labor Subpoena Power in Proceedings under all Federal Whistleblower Legislation Merits Clarification.

Section 5(f)(1) of the Bill provides the Secretary of Labor with the power to issue subpoenas during the course of investigations prompted by whistleblower complaints. Specifically, Section 5(f)(1) incorporates the provisions of Sections 9 and 10 of the Federal Trade Commission Act, 15 U.S.C. §§ 49-50, and permits the Secretary to compel the attendance and testimony of witnesses and the production of documentary evidence during the course of investigations and hearings.

We have no objection to the express subpoena power provided by Section 5(f)(1) and made applicable to existing whistleblower legislation by both that section and Section 8(a)(2). In the context of actions commenced pursuant to Section 210, most of those involved in such cases have found the subpoena power to be fairly implied in the language of the Act, and the Secretary has in fact exercised such authority. In a couple of isolated recent cases, however, the presiding Department of Labor Administrative Law Judges have been persuaded that the absence of an express provision for subpoena powers compels the conclusion that such powers do not exist. To the extent, then, that this Bill would do no more than make express what has for some time been implied in Section 210 investigations and makes no substantive modification to the Secretary's subpoena power, we believe that the Bill's provisions are well warranted.

We believe, however, that Sections 5(f)(1) and 8(a)(2) merit further clarification with regard to investigatory proceedings by the Secretary. The incorporation of the provisions of Sections 9 and 10 of the Federal Trade Commission Act makes clear, as those sections provide, that the investigating official retains the authority to compel the production of documents and the attendance and testimony of witnesses.[2] The incorporation of those sections does not expressly provide, as we believe the Bill should and as we presume the sponsors of the Bill likely intend, that discovery procedures similar to those adopted pursuant to

---

2/ Section 9 of the FTCA provides that "the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." 15 U.S.C. § 49.

Sections 9 and 10,[3] but not apparent in the statutory language of those sections, would also be available to the parties in proceedings under the Bill and under existing federal whistleblower legislation.

Thus, in addition to expressing the right of the Secretary to issue subpoenas in investigations conducted pursuant to all existing and the proposed federal whistleblower legislation, the Bill should clarify that the Secretary has the obligation, upon request of the parties to the investigation, to issue subpoenas compelling the attendance and testimony of witnesses and the production of documents and otherwise to permit discovery in accordance with the already well-established rules of the Department of Labor.[4] For purposes of the duty to issue subpoenas, Section 11(1) of the National Labor Relations Act provides apt statutory language: "The [National Labor Relations] Board, or any member thereof, shall upon application of any party to [investigatory] proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such ... investigation requested in such application."[5]

In sum, the apparent intent of Sections 5(f)(1) and 8(a)(2) of the Bill is to clarify, for purposes of Section 210 and other

---

3/ *See* 16 C.F.R. §§ 3.31-.40 (1988).

4/ 29 C.F.R. §§ 18.13-.24 (1988).

5/ 29 U.S.C. § 161(1).

existing federal whistleblower legislation, that the Secretary has the power to issue subpoenas in the course of investigatory proceedings. We urge the Committee to further clarify that, as in other types of investigatory administrative proceedings in general, the Secretary's subpoena power includes an obligation to issue subpoenas upon request of the parties to the proceeding and otherwise to permit discovery. This would make clear the intent of Congress not to condone the transformation of administrative proceedings in such cases into "trials by ambush," in which the parties could be forced to enter an adjudication hearing without the benefit of evidence vital to their case.

B. The Bill Unwisely Incorporates a 180-Day Limitations Period into All Federal Whistleblower Legislation, Regardless of the Unique Characteristics of Individual Whistleblower Protections.

As discussed above, each whistleblower provision enacted by Congress accounts for and balances the interests and concerns unique to the industry affected or the regulatory context governed by the legislation. Apparently for that precise reason, the Bill specifically provides that industries for which a federal whistleblower law has been enacted will not be affected by the new proposed legislation.

Apart from the provision relating to the subpoena power, the sole deviation from the Bill's recognition that existing whistleblower statutes have been designed to accommodate the unique interests of the industries to which they apply, is the proposed imposition on all federal whistleblower legislation of a uniform 180-day limitations period for the filing of complaints. Thus, the Bill undercuts the need for particularized whistleblower legislation in an area where industry-specific considerations should in fact carry considerable weight.

The imposition in Sections 5(a) and 8(a)(1) of the Bill of a 180-day limitations period for all federal whistleblower complaints would, we believe, unwisely undo what Congress has deliberately achieved in providing varying limitations periods for whistleblower legislation. This is particularly true in the case of Section 210, which allows thirty days for filing a complaint.[6] Section 210's limitations period, like other limitations provisions, is "the result of legislative determinations made after weighing the various interests at stake."[7] The limitations provision of S.436, in stark contrast, is based not on any re-weighing of the competing interests involved in the nuclear industry, but apparently on an assumption that uniformity is inherently more important. That assumption, however, will not withstand scrutiny.

The thirty-day limitations period of Section 210 is not arbitrary. Expedition is the hallmark of the procedure Congress prescribed under Section 210: Congress provided that the entire

---

6/ 42 U.S.C. § 5851(b)(1).

7/ School Dist. of Allentown v. Marshall, 657 F.2d 16, 20 (3d Cir. 1981) (enforcing the 30-day limitations period applicable to whistleblower claims under the Toxic Substances Control Act, 15 U.S.C. § 2622(b)).

Section 210 process (including initial investigation, remedial order, on-the-record adjudication, and final order of the Secretary) be completed within 90 days.[8] The interests served by the short periods applicable to Section 210 are apparent. Speedy dispute resolution minimizes the disruption of orderly management that litigation creates. This is particularly important in the nuclear industry which must, for the sake of public safety, run an especially "tight ship." And given the sensitivity of the issues typically raised in a Section 210 proceeding, it is all the more important that disputes surface and be resolved expeditiously. While the 180-day limitations period may make some sense in administrative proceedings under the Bill that may last well over a year,[9] such a period is clearly inconsistent with a statutory scheme that, to ensure speedy resolution of claims, mandates a conclusion to administrative proceedings within 90 days.

While testimony before the Committee has indicated that the Secretary has not always been able finally to resolve Section 210 complaints within the prescribed period, that fact does not suggest that Congress should now expand the period permitted for the filing of a complaint with the Secretary. For, in addition to the basic goal of Section 210 to resolve disputes arising in the nuclear power employment context in an expeditious manner,

---

8/ 42 U.S.C. § 5851(b)(2)(A).

9/ Under Section 5(c)-(h) of the Bill, proceedings may last up to 425 days.

the thirty-day limitations period also accomplishes another, and perhaps even more fundamental federal regulatory goal: to identify, scrutinize, and resolve the safety concerns giving rise to a Section 210 complaint in as prompt a manner as possible.

Prompt resolution of issues calling into concern the public health and safety is a primary responsibility of the NRC. To that end, the NRC has adopted rules requiring licensees immediately to report certain safety-related events. In some cases, licensees must notify the NRC within one hour, see 10 C.F.R. § 50.72(b)(1). In other circumstances, reporting is required in four hours, see 10 C.F.R. § 50.72(b)(2). In many cases, licensees must submit detailed reports on safety-related issues to the NRC within thirty days after the event giving rise to the concern. Notably, and to underscore the NRC's powerful interest in obtaining information in as short a time period as necessary, the NRC's enforcement policy permits fifty percent mitigation of a civil fine if the NRC Staff finds that the licensee's reporting of the violation giving rise to the enforcement action was prompt. 10 C.F.R. Part 2, Appendix C, Section V(B)(1). Finally, in adopting its own whistleblower protection rule, 10 C.F.R. § 50.7, the Commission noted that employee protection is desirable because employees may provide the NRC with "complete, factual, and current information concerning the regulated activities of its licensees." 47 Fed. Reg. 30452, 30453 (1982) (Final Rule) (emphasis added). Like Section 210, the NRC's whistleblower rule promotes prompt reporting of safety concerns by requiring complainants to file their claims within thirty days of an alleged violation.[10]

By permitting employees who believe they have been discriminated against in violation of Section 210 to wait six months before filing a complaint, the Bill promises to frustrate the regulatory aim of addressing safety-related issues as quickly as possible. It is in this context important to note that the existing thirty-day limitations period of Section 210 does not infringe upon a genuinely aggrieved employee's ability to bring his complaint in a timely manner. On-site notices required by the NRC provide employees with more than ample notice both of their Section 210 protections and of the time allowed for asserting their rights under that provision. See 10 C.F.R. § 50.7(e). Simply put, employees at nuclear power production facilities are well aware of the thirty-day limitations period. An extension of that period, then, would not advance the goal of providing remedies to genuinely aggrieved employees, but would undeniably frustrate the prompt resolution of nuclear safety concerns.

In sum, when Congress adopted Section 210, it determined that a thirty-day limitations provision was desirable. In this regard, it is significant that the thirty-day limitations period was in the original Bill as proposed by Senator Gary Hart that

---

10/ 10 C.F.R. § 50.7(b) provides that a proceeding under that section "must be initiated within 30 days after an alleged violation occurs."

engrafted the provisions of Section 210 onto the existing body of atomic energy law. That period "inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."[11] By implication, any longer period was deemed undesirable due to the interests noted above. Any change in that limitations provision should be the result of a careful re-analysis of the competing interests in the nuclear power industry, and should be made only upon a firm determination that the thirty-day period is no longer appropriate. The Bill neither provides the appropriate re-analysis of the interests accommodated by the thirty-day limitations period of Section 210, nor is it supported by any evidence that Congress erred in originally selecting the thirty-day period. For these reasons, we urge the Committee to reconsider the provision in the Bill that would alter the limitations periods in existing federal whistleblower legislation.

C. The Bill's Provision Regarding the Date on Which the Limitations Period Begins to Run Merits Careful Reconsideration.

In addition to extending the limitations period, Section 5(a) of the Bill provides that the period begins to run at the later of the date that (1) the alleged violation occurs, (2) the discharge or other discrimination has taken effect, or (3) the employee first learns or reasonably should have learned of the violation. This Section is expressly made applicable to existing federal whistleblower protection law, including Section 210.[12]

---

[11] Johnson v. Railway Express Agency, 421 U.S. 454, 463-64 (1975).

By providing that the limitations period will not begin to run until at least the time the discharge or other discrimination takes effect -- even if that date is well past the point in time when the employee learns of the violation the end result of which is discharge -- the Bill expands even more the time frame in which disputes subject to the whistleblower provisions may be left unresolved. In effect, Section 5(a) seeks to overturn an established body of case law, emanating from the Supreme Court's decision in Delaware State College v. Ricks[13] and holding that the limitations period begins to run from the date on which the employee learns or should have learned of the allegedly discriminatory act -- not from the date on which the effects of the employer's action begin to be felt. The approach taken in Ricks, which looks to the discriminatory act rather than its consequences, seems to us quite sensible, particularly in a regulatory scheme in which timeliness is otherwise highly valued.

12/ In this respect, section 5(a) is inconsistent on its face with section 8(a), which states an intention "to supersede an existing Federal whistleblower protection law only insofar as such law" provides a statute of limitations of less than 180 days and does not authorize subpoena power.

13/ 449 U.S. 250 (1980).

We can see no reason for departing from that approach -- at least not in the context of Section 210. It is in all events hard to see why the Bill should provide complainants under the proposed legislation (and existing federal whistleblower provisions) a more advantageous rule than that accorded to plaintiffs under civil rights statutes.

Section 5(a)'s provision that the limitations period does not begin to run until the discrimination takes effect would substantially alter current Section 210 jurisprudence. At present, the limitations period begins to run when the decision allegedly violating whistleblower provisions is made and communicated to the employee.[14] This policy encourages complainants to pursue their claims as quickly as possible and is entirely consistent with the speedy process designed by Congress to resolve whistleblower complaints in the nuclear power context. As already noted, prompt resolution of whistleblower-type disputes is especially desirable in the nuclear safety context because orderly management and conduct are essential to the safe operation of nuclear power facilities.

Together, the extension of the limitations provision to 180 days and the extension of the date on which the period may begin to run has a dramatic effect on Section 210 jurisprudence -- despite the Bill's recognition that existing federal whistleblower legislation should be left largely intact. Under

---

14/ See English v. Whitfield, 858 F.2d 957, 960-62 (4th Cir. 1988) (applying Ricks to Section 210 action).

current Section 210 jurisprudence, an employee must file a complaint within thirty days after he learns of a violation of the act. Within 90 days thereafter, the Secretary must issue a final order.[15] Thus, within 120 days after an employer has evidenced his intent to do some act violative of Section 210, the administrative process designed to resolve the dispute will have been completed. In contrast, S.436 provides that an employee may wait 180 days after he is discharged or otherwise discriminated against to decide to pursue his administrative remedy. Ninety days thereafter, the Secretary must issue his final order -- 270 days following the discharge, and well over twice as late as a decision mandated under existing law.

III. SEVERAL OF THE OTHER GENERALLY APPLICABLE PROVISIONS OF THE BILL ALSO MERIT RECONSIDERATION

The foregoing comments are limited to those two provisions of the Bill that would apply within the nuclear power industry. Since application of the remaining provisions of the Bill is expressly precluded in cases involving whistleblowing activity under the Atomic Energy Act or the Energy Reorganization Act, our concern with those provisions is less direct. We understand, however, that Senator Metzenbaum has invited comments from the community of industrial employers generally, as members of which we very much share the sponsors' concern that the Bill be as good as it can be. For this reason we gratefully accept the

---

15/ 42 U.S.C. § 5851(b)(2)(A).

Chairman's invitation and offer the following critique and proposed modifications of a few of the specific provisions of S.436.

A. Good Whistleblower Legislation Must Accommodate Conflicting Interests And Objectives And Avoid Overly Simplistic Assumptions.

At the outset, we would like to emphasize that we share with those who support S.436 a recognition that the health and safety of the workforce and the public are very important interests. We also believe that appropriate legal protections for whistleblowers can advance those interests and thus have a place in this nation's laws. Our concerns are with what legal protections may be appropriate, how they may be implemented, how susceptible they are to being abused, and the extent to which they may reduce an employer's ability to maximize his efforts to ensure that employee and public health and safety are not endangered. In short, it must be recognized that the desirability of a law that provides remedies to alleged victims of retaliation does not mean that other equally worthy legislative objectives can or should be ignored or sacrificed. It is easy enough, and true enough, to say that honest whistleblowers should be protected. But saying so does not solve the problem, it only states the problem, and the solution cannot be so easily formulated.

The assumption underlying S.436 is that there are employees in industries affecting health and safety who have genuine and sincere concerns about the health and safety of themselves and others and who are at risk of being mistreated by their employers for voicing those concerns. We have no reason to doubt the truth of this assumption. An equally valid assumption, however, and one that we believe the legislation in some respects overlooks, is that there are also, in any industry, malcontented, poor performers who would prefer to use litigation to obtain job security rather than to work in a conscientious and responsible way. As Mr. Fidell stated in his report, upon which both the Administrative Conference recommendation and ultimately S.436 were largely based, whistleblower legislation must be "so managed as to offer no reason for malcontents or marginal performers to see it as an insurance policy against proper discipline." Cong. Rec. (daily ed. Feb. 23, 1988) at S.1453.

Thus the common theme in the following specific proposals is a concern that the law not lead to results at odds with its goals, and that it not be too easily subject to abuse by those undeserving of its benefits. The format we adopt for each section discussed is first to describe proposed modifications, then to set forth the text of the section as it would read if modified as proposed (with additions underlined and deletions scored), and then, briefly, to articulate the basis for each proposed modification.

B. Proposals for Modifications of S.436

1. Sec. 2(b) [add a new subsec. (6)]:

[Delete "and" after the semicolon in subsec. (4) (at p. 2, line 24 of the proposed text). Change period at the end of subsec. (5) to a semicolon and insert "and" after the semicolon (at p. 3, line 3). Insert the following language after subsec. (5).]

"(6) providing an adjudicatory process that is reasonably prompt and reliable and so managed as to offer no reason for malcontented employees or marginal performers to see this Act as an insurance policy against proper discipline.

Rationale: The language that we propose to insert is a close paraphrase from the report of Eugene Fidell to the Administrative Conference of the United States. See Cong. Rec. (daily ed.) at S1453 (Feb. 23, 1988). As Fidell acknowledges, one of the dangers in expanding the protection of whistleblowers is that the law designed to accord such protection may, if not administered soundly, have the perverse effect of making it more difficult for an employer to take disciplinary action against employees whose conduct on the job is actually deleterious to the interest of public health and safety embodied in the law. No one could want to bring about such a result or to create a situation in which whistleblower protection could get twisted into a shield against legitimate disciplinary action in the workplace. While the proposed addition of the above language to the section outlining the congressional purpose is not as critical as the more substantive proposals we set forth below, its inclusion in the declaration of purpose would thus help set the tone for balanced interpretation and application of the Bill if it is enacted into law.

2. Sec. 3(3)(B)(ii)

[Delete subsection B(ii) from the definition of "employer" (at p. 4, lines 5-6).]

Rationale: The phrase that we propose to delete would include in the definition of "employer" both an agent and an employer of the employee's employer. This language could be construed to mean that an employee who deemed himself aggrieved under the Act could sue his supervisor personally. In addition, where the employee's actual employer is a contractor doing work for another company, the employee might be held to be able to sue the other company in addition to or in lieu of his own employer, even if the other company had nothing to do with the allegedly illegal acts and was not involved in directing the contractor's work force or setting personnel policies for the contractor's employees. If so construed, of course, this language would have worked a reversal of a considerable body of law on the "coemployer" doctrine, which has evolved a measured approach to determining when one company may be held liable for the allegedly illegal acts of another company directed against the employees of the latter.

3. Sec. 4(a) (introductory portion)

[Add the word "wilfully" between "manner" and "discriminate" (at p. 7, line 21) so that the introductory clause would read as set forth below.]

"(a) In General.--No person shall discharge or in any other manner wilfully discriminate against any employee because the employee--"

Rationale: This small addition is designed to make it clear that it is intentional discrimination that is actionable and that must be proven in order for the employee to recover under the Act. Actions taken by employers that are taken without any intention to discriminate against whistleblowers but that inadvertently or incidentally affect them cannot be the subject of governmental regulation if the balanced approach embraced in the Fidell Report (see discussion on Sec. 2(b) above) is to be adopted.

4. Sec. 4(a)(1)

[Add the phrase "to a competent Federal Agency" between the word "disclose" and the comma following it (at p. 7, line 24); and insert the words "reasonably and in good faith" between "employee" and "believes" (at pp. 7-8, lines 24, 1) so that the subsection reads as set forth below.]

"(1) discloses, or demonstrates an intent to disclose to a competent Federal Agency, an activity, policy, or practice that the employee reasonably and in good faith believes evidences a violation a Federal health or safety law;"

Rationale: 1. The first change we propose in subsection (1) would cure the indefiniteness in the present language, leaving it unclear as to what disclosures are protected. As written, for example, the Bill would protect employees who make disclosures to agents of the Soviet Union. As the proposed language reflects, we believe that according protection to employees for raising health and safety complaints with their own employers is also ill-advised because of the ease with which the employer's motives in a legitimate disciplinary case can be called into question if there were recent internal communications about health and safety matters which, in many industries, is usually the case. If limitation of the protection to disclosures (and the intent to disclose) to competent organs of government is unacceptable, we would suggest adding instead the phrase "to a competent Federal Agency or to appropriate supervisory personnel of the employee's employer." Certainly, disclosures beyond those encompassed by that phrase should not be protected. Disclosures to the press, for example, are at best an only indirect way to advance the cause of public health and safety when the option of raising the matter with a government agency with jurisdiction over the matter is available. Protecting such disclosures, moreover, would lend governmental sanction to employees waging war against their own employers through the press rather than pursuing the avenues that are most likely to produce improved compliance with any applicable regulations. Indeed, as currently written, the Bill might be construed to provide protections to employees who make false statements in the press about acts or omissions of their employers.

2. The second change that we have proposed above (the addition of "reasonably and in good faith") substantially incorporates the good faith requirement of the opposition clause of Section 704(a) of Title VII of the Civil Rights Act (*see* 42 U.S.C. § 2000e-3(a)) and is necessary to protect against employees' abusing the law by voicing safety concerns purely as a strategem for protecting themselves against impending legitimate discipline. Under the law as written, such an employee would also be protected from discipline for making admittedly fraudulent safety complaints.

5. *Sec.s 4(a)(2), 4(a)(2)(A)*

[Insert "concerned with health and safety matters" between "proceeding" and "with" (at p. 8, line 5); and insert "reasonably and in good faith" between "employee" and "believes" (at p. 8, line 7) so that subsection (2) reads as set forth below.]

"(2) initiates, assists, participates, or demonstrates an intent to initiate, assist, or participate, in a proceeding *concerned with health or safety matters* with respect to -- (A) an activity, policy, or practice that the employee *reasonably and in good faith* believes evidences a violation of a Federal health or safety law;"

Rationale: 1. The first proposed change is designed to assure some nexus between the proceeding in which the employee is to participate or assist and the health or safety problem that the employee invokes. It would seem very doubtful, for example, that the Federal government would have any legitimate interest in according protection for employees who make assertions about the health and safety compliance posture of their employers during the employees' divorce proceedings.

2. The second change is designed to conform the language of subsection 4(a)(2) with our proposed modification of subsection 4(a)(1).

6. **Sec. 4(c)**

[Insert "committing," between "deliberately" and "causing", and "or attempting to commit or cause" between "causing" and "a violation" (at p. 9, line 15). Add sentence at the end of the subsection to remove coverage from employees who fail or refuse to follow applicable regulations or procedures unless necessary to avoid imminent danger.]

"(c) Exemption.--This Act shall not apply under circumstances where an employee acted without direction from the employee's employer, deliberately commiting, causing, or attempting to commit or cause a violation of a Federal health or safety law. The protections of this Act also shall not apply to any employee who, without having been directed to do so by his employer, deliberately fails or refuses to comply with the provisions of applicable Federal health and safety laws or regulations, or with work procedures promulgated by the employer for the purpose of effecting compliance with such laws or regulations, or who fails or refuses to follow direction given to the employee by his employer, unless such failure or refusal is protected under Section 4(a)(3) of this Act."

Rationale:

1. The basic premise of Sec. 4(c) as proposed in the Bill seems to be that federal protection should not be accorded to those who themselves break the law or cause the law to be broken. Our proposed modifications of the language in the Bill are intended to: 1) make it clear that those who themselves commit violations of the law put themselves beyond the Act's protections, as well as those who cause others to commit such violations; and 2) remove the Act's protections from those who attempt to violate the law but are unsuccessful in doing so (this modification springs from the theory that deterrence of lawbreakers is best effected when applied to those who attempt to break the law, as well as to those who succeed in the attempt).

2. The language that we propose to add as the second sentence of Sec. 4(c) would broaden the exemption a bit more so that employees who themselves fail or refuse to comply with applicable health and safety laws and regulations or employer-initiated

procedures intended to advance compliance with applicable health and safety regulatory schemes would be ineligible for the Act's protections, even if such failure or refusal did not constitute a violation of law, in the interest of avoiding the perversions of legislative intent that could result if such individuals were engaged in undermining their employer's compliance efforts but were nevertheless able to shield themselves from discipline by invoking protections intended for legitimate whistleblowers sincerely interested in ensuring compliance with regulatory health and safety requirements.

7. **Sec. 5(c)(2)**

[Change the phrase "the complaint has merit" (at p. 11, lines 4-5) to "a violation of this Act has occurred", delete, in the last sentence (at p. 13, line 24) "of the complainant and"; and strike the phrase "of this Act" (at p. 11, line 6). Delete the language in the last sentence of the subsection following "subsection (i)".]

"(1) In General.--Within 60 days of the receipt of a complaint filed under subsection (b), the investigation office shall conduct an investigation, determine whether there is reasonable cause to believe ~~the complaint has merit~~ a violation of this Act has occurred, and make findings of fact. If there is reasonable cause to believe a violation ~~of this Act~~ has occurred, the investigation office shall accompany the findings of fact with a preliminary order providing the relief prescribed by subsection (i). ~~, including immediate reinstatement of the employee pending a final order on the complaint.~~"

Rationale: 1. The change of "the complaint has merit" to "a violation of this Act has occurred" is intended to clarify what it is that the investigation office is supposed to determine (i.e., some complaints may "have merit" but the investigation office may find no probable cause to believe a violation occurred, as in the case of a complainant exempted under section 4(c).) The deletion of "of this Act" in line 8 would be required syntactically if our proposed change in the previous sentence is made.

2. We believe that the prehearing reinstatement provision represents an extraordinarily onerous intrusion on the rights of employers which, as far as we know, has no precedent in any other employment legislation except the Surface Transportation Assistance Act. It happens with some frequency in other labor and employment law contexts (e.g., Title VII, NLRA, etc.) that the court will find that a violation of the law has occurred, but that misconduct of the employee nevertheless precludes a grant of reinstatement. Moreover, it is not too difficult to imagine circumstances in which interim reinstatement could actually be detrimental to the interests of health and safety if the employee himself were not fully committed to compliance with health and safety regulations or if circumstances were such as to make it very difficult for the employee and his supervisors to work together. If it is unacceptable to delete the clause altogether, however, we suggest a modification of the clause to incorporate the limits set forth in the language below:

> "If the violation of this Act has caused the termination of the employee's employment and reinstatement is sought, the investigation office may provide in the order for the employee's immediate reinstatement, with the employer having the option of placing the employee on a leave with pay status pending final disposition of the case, if the investigation office makes specific findings, including findings with regard to all pertinent supporting facts and the witnesses and/or documents from which such facts are derived:
>
> 1. that the employee would not have been terminated but for the employee's having engaged in protected activities as defined in Section 4(a) of this Act;
>
> 2. that there appears a strong likelihood that the complainant will prevail on the merits if

the issues raised in his complaint are litigated;

3. that the complainant has not been guilty of any misconduct or improper actions that would create a substantial issue as to the employee's right to reinstatement even if a violation is found; and

4. that there is no reason to believe that the employee's reinstatement will in any way be deleterious to the interests of the health and safety of the employee, other employees, or the public.

No order of the investigation office shall require the reinstatement of an employee if such employee was terminated for any reason other than discrimination on account of the employee's having engaged in protected activities in violation of Section 4 of this Act."

Note that the last clause of this proposed modification is modeled on similar language in Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(g), and in Section 10(c) of the National Labor Relations Act, 29 U.S.C. §160(c).

8. Sec. 5(c)(4)

[Change the entire section following the word "Act" on p. 11, line 22.]

"(4) HEARING PROCEDURE.--In all hearings conducted under this Act, ~~once-the-complainant-has-established-by a-preponderance-of-the-evidence-that-an-activity protected-by-this-Act-was-a-factor-in-the-alleged discharge-or-discrimination,-the-burden-of-proof-shall be-on-the-respondent-to-prove-by-clear-and-convincing evidence-that-the-alleged-discharge-or-discrimination would-have-occurred-even-if-the-employee-had-not-engaged in-activities-protected-by-this-Act.~~ the administrative law judge shall find for the complainant if he finds that it has been shown by a preponderance of the evidence: 1) that the complainant engaged in activities protected under Section 4(a); 2) that the employer was aware of the employee's having engaged in such activities; and 3) that but for the employee's having engaged in such activities, the employment action that is the subject of the complaint would not have occurred."

Rationale: The sentence that we propose to insert is one of the most important things that could be done to improve the present bill. It would simply make it clear that, as is already the case for race and sex discrimination cases under Title VII of the Civil Rights Act of 1964, a violation is established and the complainant is entitled to recovery only upon carrying his burden of showing by a preponderance of the evidence that his involvement in activities protected by the Act was the determining cause in the employment action of which he complains. See, e.g., McMillan v. Rust College, Inc., 710 F.2d 1112, 1116 (5th Cir. 1983) (In order to recover for alleged retaliation under Title VII, plaintiff must show "that 'but for' the protected activity, the termination would not have occurred, notwithstanding the other reasons advanced by the defendant."). The provision as written, not only imposing a burden of disproving a violation upon the respondent, but requiring that wrongful motive must be disproved by clear and convincing evidence (which as a practical matter is a virtual impossibility whatever the facts), is little short of a prejudgment of liability in every case involving protected activity. Unless all notions of fair play and judicial integrity are to be abandoned, the risk of nonpersuasion must be the complainant's.

9. **Sec. 5(i)(1)**

[Change "shall" to "may" at p. 16, line 18. Add sentence at the end of the subsection providing that reinstatement and backpay are not to be awarded in certain circumstances.]

"(1) In General.--If in response to a complaint filed under subsection (b), the Secretary, investigation office, or administrative law judge determines that a violation of this Act occurred, the Secretary, investigation office, or administrative law judge ~~shall~~ may order--

> (A) the person who committed the violation to take affirmative action to abate the violation;
>
> (B) such person to reinstate the complainant to the complainant's former position, if reinstatement is sought, together with compensation, including back pay and lost benefits, terms, conditions, and privileges of the complainant's employment;
>
> (C) compensatory damages; and
>
> (D) such equitable relief as is necessary to correct any violation of this Act or to make the complainant whole.

No order of the Secretary, investigation office, administrative law judge shall require the reinstatement of any complainant as an employee, or the payment to him of any back pay, if such complainant was terminated for any reason other than discrimination on account of the employee's having engaged in protected activites in violation of Section 4 of this Act. Nor shall reinstatement of any complainant be ordered absent a specific finding that there is no reason to believe that the complainant's reinstatement will in any way be deleterious to the health and safety of the complainant, other employees, or the public."

Rationale: 1. The use of the word "shall" in the introductory clause of the subsection could be construed to suggest that the Secretary, investigation office, and ALJs are left with no discretion to fashion an appropriate remedy to fit the specific circumstances of the case before them. As was discussed above in connection with our comments on Sec. 5(c)(2), the body of labor and employment law cases contains several examples of situations in which courts or agencies exercised their equitable discretion not to order reinstatement because the employee's misconduct made that remedy inappropriate. *E.g., NLRB v. R.C. Can Co.*, 340 F.2d 433 (5th Cir. 1965) (reinstatement improper where employee threatened "to kick hell out of" his supervisor); NLRB v. Bin-Dicator Co., 356 F.2d 210 (6th Cir. 1966) (threats of inflicting crippling mayhem on two supervisors provided sufficient basis for denying reinstatement and backpay). In any event, it makes little sense to confer equitable powers on a tribunal, but leave no discretion for the tailoring of the remedy to fit the peculiar circumstances of each case. Changing "shall" to "may" would make it clear that the Secretary, investigation office and administrative law judge retain such discretion.

2. To effect a balanced approach to the administration of whistleblower legislation, it is necessary that Congress clearly articulate its intention that the remedial provisions of S.436 be applied in such a way as to advance, rather than compromise, the overriding goal of advancing public health and safety. The first of the two sentences that we propose adding to this subsection is drawn directly from similar language in Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-5(g)) and the National Labor Relations Act (29 U.S.C. §160(c)), and we can think of no legitimate ground on which it could be found objectionable. The second of the sentences is designed to make it clear to those who will be called on to decide cases under the Act that whistleblower protection is, after all, a tool for advancing the cause of health and safety. Thus, when the former conflicts with the latter, the former must give way. Again, we can think of no principled objection to such a provision, because we can think of no good reason why anyone would want to insist on reinstatement of a complainant when providing that remedy would be antithetical to the purposes of the health and safety laws that this whistleblower legislation is designed to advance.

10. **Sec. 5(j)**

[Delete this Section in its entirety.]

Rationale: Providing for the complainant to be able to commence a civil action if he is dissatisfied with the progress of his case in the Department of Labor would, under the best of circumstances, be very wasteful. As the bill is drafted, the right to commence a civil action could almost never be exercised until after the case had been fully tried before an ALJ. Starting over in the district court at that point would serve no one's legitimate interests. Although we would not be adverse to doing away with the administrative forum altogether and assigning all whistleblower cases to the jurisdiction of the federal district courts for adjudication, we view the maintenance of parallel and duplicative avenues for adjudication as a needless waste of the resources of the parties and the government.

11. **Sec. 5(l)(1)** [revise to create new subsecs. (i) and (ii)]:

[Add, preceding "[t]he Secretary" (at p. 20, line 6) "(i) In cases when the Secretary has intervened pursuant to Section 5(e),"; add at the end of the second sentence (at p. 20, line 9) "or his representative"; add at the beginning of the third sentence (at p. 20, line 9) "(ii) In cases where the Secretary has not intervened"; add language at end of subsec. (l) so that the Section would read as set forth below.]

"(l) SETTLEMENT.--On receipt of a complaint pursuant to subsection (b), the investigation office shall attempt to reach a settlement between the complainant and the respondent.

> (i) In cases where the Secretary has intervened pursuant to Section 5(e), [t]he Secretary, investigation office, or administrative law judge shall not enter into a settlement terminating a proceeding without the participation and written consent of the complainant or his representative.

(ii) In cases where the Secretary has not intervened, [a]ny settlement order issued pursuant to this subsection shall be a final order of the Secretary and shall include findings that the settlement is fair, adequate, reasonable, and in the public interest. Nothing in this subsection (l)(1) shall be construed to limit the rights of the complainant in a proceeding under this Act to obtain the voluntary dismissal of the proceeding by filing a stipulation of dismissal, signed by all parties to the proceeding, at any time prior to the issuance of a decision under subsection 5(e)(5) hereunder."

Rationale: 1. The thrust of the changes we recommend here is to maintain the important distinction between the Secretary's role as advocate and his role as judge. Hence we propose distinct treatment of cases in which the investigation office has become a party, and those cases where the Department performs a purely judicial function and enters orders based upon the parties' settlement.

2. The language we propose to add at the end of section 5(l)(1), relating to voluntary dismissals, is intended to incorporate the substance of Fed. R. Civ. P. 41(a). We think it would pervert the remedial goals of the legislation to prohibit a complainant from choosing to drop a suit that he or she concludes was not well conceived -- at least where the suit has not proceeded so far as a decision by the administrative law judge. And as has been emphasized by the courts, Fed. R Civ. P. 41(a) is more than a technical point of procedure; instead, it reflects fundamental assumptions we share regarding the limited role of judicial officers in a free society. United States v. Miami, 614 F.2d 1322, 1330 (5th Cir. 1980); Gardiner v. A. H. Robins Co., Inc., 747 F.2d 1180, 1189-90 (8th Cir. 1984). We note in addition that the Secretary has himself found it appropriate and helpful to apply Fed. R. Civ. P. 41(a) to whistleblower proceedings under the Surface Transportation Act. Hester v. Blue Bell Services, No. 86-STA-11 (Decision and Order of Remand, July 25, 1986).

12. Sec. 5(o) [New]:

> "(o) WAIVER OF TIME RESTRAINTS - Nothing in this section shall be construed to limit the rights of the parties to a proceeding under this Act to waive, by mutual written agreement, any time restraints imposed by this Act."

Rationale: As a general matter we think the parties' ability to agree to afford the Secretary, the investigation office, or an administrative law judge extra time to complete their functions is felicitous. More specifically, we note that such a provision may be necessary to facilitate the alternative dispute resolution provisions of section 5(l).

13. Sec. 7(b) [add language at end of section so that the section would read as set forth below.]

> "(b) OTHER INVESTIGATIVE AUTHORITY.--Subject to section 8, nothing in this section shall limit the authority of any Federal agency under any other law, except that the imposition by any agency of fines or other penalties for an act or acts allegedly constituting a violation of Section 4 hereunder is expressly prohibited where such act or acts either (i) have been or might be made the basis for an award of damages or other relief under this Act; or (ii) have been determined, by a final order of the Secretary, not to have constituted a violation of Section 4."

Rationale: 1. The key distinction to be made here is between (a) regulation of the underlying activity or policy the whistleblower has reported and (b) the investigation of actions taken by the employer in response to the act of reporting. With regard to the former, it is important that the responsible agency be able to take whatever corrective steps are appropriate, as is ensured by the whole of section 7. Punishing the employer for discriminating against the whistleblower, however, is another matter, and as we understand it the main purpose of the Act is to centralize this latter category of regulatory action in the Department of Labor under a uniform law. This purpose will be compromised if other federal agencies also take it upon themselves to fine or otherwise discipline an employer thought guilty of discrimination. Thus the proposed additional language is consistent with, if not compelled by, the goal of the proposed Act.

2. Clause (ii) in the additional language is designed to serve the policies underlying the doctrine of res judicata.

14. **Sec. 8(b)** [add language to the title, and to the end of the section, so that they would read as set forth below]:

> "(a) STATE RIGHTS AND REMEDIES; ELECTION OF REMEDIES.--The rights and remedies provided to employees by this Act are in addition to, and not in lieu of, any other rights and remedies of the employees provided under State law, and are not intended to alter or effect such rights and remedies provided, however, that no person may maintain an action under State or Federal law that arises from the same occurrence or occurrences which that same person has made the basis for a proceeding under this Act which has resulted, or may result, in a final order by the Secretary.

Rationale: We cannot agree with the "non-preemption" provision of the proposed legislation. Putting this disagreement aside, however, this provision appears to go much further and actually to preclude application of the salutary principles of res judicata and election of remedies. The proposed additional language is designed to make it clear that, while State law remedies are in no way preempted, the Act is not designed to encourage or approve repetitive or harassing litigation.

AFSCME®
American Federation of State, County and Municipal Employees, AFL-CIO
1625 L Street, N.W., Washington, D.C. 20036
Telephone (202) 429-1000
Telex 89-2376
Facsimile (202) 429-1293

Gerald W. McEntee
President

William Lucy
Secretary Treasurer

Vice Presidents

Ronald C. Alexander
Columbus, Ohio

Joseph Bolt
Richmond, Ind.

Joseph M. Bonavita
Boston, Mass.

George Boncoraglio
New York, N.Y.

Robert A. Brindza
Columbus, Ohio

Steve Culen
Chicago, Ill.

Albert A. Diop
New York, N.Y.

Danny Donohue
Hauppauge, N.Y.

Anthony M. Gingello
Rochester, N.Y.

James Glass
Lansing, Mich.

Stanley W. Hill
New York, N.Y.

Blondie P. Jordan
Orlando, Fla.

Edward J. Keller
Harrisburg, Pa.

Joseph J. Kreuser
Menomonee Falls, Wisc.

Faye D. Krohn
Kasota, Minn.

Marilyn LeClaire
Columbiaville, Mich.

Joseph E. McDermott
Albany, N.Y.

Donald G. McKee
Des Moines, Iowa

Jack Merkel
Trenton, N.J.

Gary Moore
Olympia, Wash.

Russell K. Okata
Honolulu, Hawaii

George E. Popyack
Redwood City, Calif.

Thomas A. Rapanotti
Baltimore, Md.

Joseph P. Rugola
Columbus, Ohio

Edward H. Sasso
New Britain, Conn.

Burtmon D. Smith
Philadelphia, Pa.

Linda Chavez-Thompson
San Antonio, Tex.

Garland W. Webb
Baton Rouge, La.

STATEMENT

before the

SUBCOMMITTEE ON LABOR

of the

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

on

S.436

THE EMPLOYEE HEALTH AND SAFETY WHISTLEBLOWER PROTECTION ACT

March 21, 1989

On behalf of the 1.2 million members of the American Federation of State, County and Municipal Employees (AFSCME) we are pleased to be able to submit this statement in favor of S.436 the Employee Health and Safety Whistleblower Protection Act.

We have just begun to provide legal protection to whistleblowers in this country. One obstacle to the adoption of legislation has been our social mythology which belies the need for such laws. Whistleblowers become community heroes, are welcomed back by reformed employers or move on to new and better lives. We have biographies, television shows, movies and novels that promise that these are the rewards for having done the right thing.

In real life, however, whistleblowers are harassed by their employers and shunned by fellow workers hoping to avoid the same harassment. Black-listing bars them from all opportunity for advancement in their chosen profession. Whistleblowers lose their jobs, their houses and, sometimes, their families. Worst of all they begin to doubt the value of what they have done.

Several of the witnesses before this subcommittee said that they would not encourage others to follow their paths. They said that if they had foreseen the consequences of their actions they would not have spoken up in the first place. These people once believed the promises implicit in our social mythology. Now they understand that attention to the public good, and to the health and safety of co-workers, does not carry its own rewards. It can cost an individual his/her job, sanity, security and happiness.

In S.436, 'Senators Howard Metzenbaum and Charles Grassley have drafted legislation that will move this nation one step closer to the ethical standards reflected in our social mythology and one step away from a reality that prevents people from acting to protect the health and safety of their fellow citizens. S.436 is a significant addition to this nation's small, but growing, number of whistleblower protection statutes.

Most current whistleblower statutes are industry and hazard specific. For instance, truck drivers are protected when they point out safety violations on their vehicles and school employees are encouraged to disclose hazardous asbestos where they work. S.436 would close existing gaps in whistleblower protections in federal public health and safety laws. Workers in all industries, including public employment, who currently have no statutory remedy against reprisal for reporting threats to public health and safety will gain such protections in the future. This bill will make all employers seeking a competitive advantage in the market place or seeking to reduce costs in times of tight budgets less likely to do so in violation of federal public health and safety laws.

By closing the gaps in current coverage, S.436 will add whistleblower protections to existing public health and occupational safety laws such as the Consumer Product Safety Act, the Noise Pollution Control Act, the Food, Drug and Cosmetic Act and the Federal Insecticide, Fungicide and Rodenticide Act. S.436 would also extend, for the first time, whistleblower protections to employees in the airline and nuclear weapons industries.

While closing gaps in current coverage S.436 continues a pattern firmly established under existing public and occupational health and safety whistleblower protection clauses. It includes state and local public employees and public employers within its provisions. The Toxic Substances Control Act, Asbestos Hazard Emergency Response Act, Occupational Safety and Health Act (for state plan states), Water Pollution Control Act, Safe Drinking Water Act, Solid Waste Disposal Act and Superfund all apply their whistleblower protection sections to state and local employees.

In addition, S.436 provides protection for workers, not covered by current public health and safety laws with whistleblower clauses, who participate in proceedings or activities intended to lead to the enactment or amendment of federal health and safety laws. This may be particularly important to public employees, many of whom still do not have the OSHA protections most workers have enjoyed since 1970.

Twenty seven states still resist adopting state plans under OSHA that would protect public sector workers. As part of the Labor Movement's Worker Memorial Day this April 28th AFSCME will soon provide members of the Subcommittee with information about dozens of public workers who have died in the last five years because of dangerous or adverse conditions on the job. Public employees suffer a higher injury and illness rate than most private sector employees.

Finally, AFSCME supports S.436 because it protects individuals from retaliation by their own employer when they report violations of federal health and safety laws by other employers. Many public workers are in jobs that train them to recognize threats to public health and safety. Among these are public health service officers, consumer protection officers, restaurant and building inspectors, maintenance and repair employees, utility workers, environmental protection officers and air pollution control experts. Their daily routines, knowledge and professional relationships bring to their attention violations of federal health and safety laws, violations by public and private employers other than their own.

Often it is not within their job duties to report such violations. The violations that come to their attention may be committed by important institutions -- public, private or even non-profit -- within the community. These are institutions that might be tempted to use their power and prestige to pressure a Governor, County Commissioner, Mayor or public agency head to discipline or fire a public employee who dared to publicize activities on their part that created a threat to public health and safety. S.436 would give elected officials and their department heads a reason to resist this kind of pressure. It would encourage public employees with the skill to recognize threats to the public health and safety the protection and confidence to reveal them.

S.436 is a well considered addition to the nation's whistleblower protection laws. AFSCME urges the Congress to adopt it.

Independent Federation of Flight Attendants
630 Third Avenue, New York, New York 10017
(212) 818-1130

VICTORIA L. FRANKOVICH
PRESIDENT

March 10, 1989

The Honorable Howard M. Metzenbaum
United States Senate
140 Senate Russell Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

As President of the TWA Flight Attendant union, I am writing to thank you for introducing your comprehensive whistleblower legislation, S.436. We strongly support its passage, since we have experienced a particularly strong need for such legislation. Since our strike against Carl Icahn three years ago, many of our members who actively participated in the strike have been disciplined for numerous "offenses" which include reporting of aircraft health and safety problems to the FAA. The message to all TWA Flight Attendants is simple — do not go to any outside agency with problems or you will be fired.

For example, a Flight Attendant recently received a letter of reprimand for "giving information to the FAA". This Flight Attendant had written a report to TWA and openly noted on the report that copies were being sent to the FAA and DOT. The report's intent was merely to inform TWA, FAA and DOT about the difficulties in complying with federal anti-smoking regulations caused by aircraft seat configurations. The Flight Attendant thought she was being helpful, and instead became subject to disciplinary action.

Another TWA Flight Attendant informed an FAA inspector on board her flight about a safety violation involving the stowage of garbage. She had previously notified TWA of stowage problems on this type of aircraft, and had also informed the captain on the flight. TWA later instructed this Flight Attendant to prepare a report of the problem, and yet subsequently refused to let her return to work until she agreed to rewrite the report in a manner acceptable to TWA. A TWA supervisor told her in the presence of witnesses that "you shouldn't talk to the FAA. Who is your employer? TWA or the FAA?"

The Honorable Howard M. Metzenbaum
March 10, 1989
Page Two

As our Flight Attendants face this type of resistance from their own employer in communicating problems to the FAA, only a change in present law can adequately protect them.

We thank you for your concern about wanting to solve this whistleblower problem permanently in this country. We shall gladly work with you and your staff to get this legislation passed.

Sincerely,

Vicki Frankovich

Vicki Frankovich

VF 26B.63

ASSOCIATION OF FLIGHT ATTENDANTS AFL-CIO
1625 MASSACHUSETTS AVENUE, NW WASHINGTON DC 20036 202 328 5400 [illegible]

March 6, 1989

The Honorable Howard Metzenbaum
Chairman, Subcommittee on Labor
United States Senate
140 Senate Russell Office Building
Washington, DC 20510

Dear Mr. Chairman:

The Association of Flight Attendants, AFL-CIO, the largest flight attendant union in the U.S. representing 24,000 flight attendants at 18 airlines, strongly supports your bill, S. 436, the Employee Health and Safety Whistleblower Protection Act.

All American workers need to be protected from reprisal when they "blow the whistle" on dangerous activities that threaten their health and safety or that of the public's. The Occupational Safety and Health Act provides protection for workers who report hazards to OSHA. Your bill would bring aviation employees the same protections afforded other workers. This is essential in aviation because a hazard to an airline employee, such as a flight attendant, is also a hazard to hundreds of passengers.

Flight attendants and other aviation employees seriously need whistleblower protections to ensure that they will report serious safety problems at work. We have seen over and over again that companies do not welcome safety criticism and do penalize employees who report safety problems to the Federal Aviation Administration.

The aviation industry is operating under intense competitive pressure, fueled by deregulation, which is leading to dangerous safety shortcuts. These shortcuts are chronicled in the tens of millions of dollars of FAA fines that the carriers have had to pay during the last few years, and in the grounding of unsafe aircraft by the FAA. They are chronicled in recent airworthiness directives over shoddy workmanship and in the extensive deferral of safety items that need repair.

We recently heard the following frightening story from one of our members who works for a regional airlines. It is a part 135 airline, which requires one flight attendant per aircraft (over 20 seats). A few months ago, she was sitting in the jumpseat next to an exit door on one particular aircraft when she heard the door rattling, the handle flapping and the air whistling. She also felt air movement from the door. She checked to make sure the handle was in its correct position. When that did not correct the problem, she notified the first officer about the noise and air leak. The first officer is responsible for writing up maintenance problems on board. He told her that it was her imagination and not to worry about it.

The problem continued the entire flight, making communication with passengers difficult because of the noise. Fearing for her own safety and for the safety of her passengers, when the plane finally reached a maintenance base, she notified a mechanic of the problem. He told her that "doorhandles do not flap" and that she must have imagined the noises. Unsatisfied with this response but, worried that she would lose her job if she notified the company, she contacted her local union representative who in turn notified the local pilot union leader. He took the time to explain to her how she could check to see if the door was secured properly. She had never been taught this during her flight attendant training. Although this lesson made her feel better because she could visually check the door, the problem persisted.

Each time she flew on that plane, she heard the rattling and flapping. She also began to experience ear problems, which she believed were probably due to the broken seal, since the plane was not properly pressurized. She attempted to bid not to fly on this aircraft but she was not senior enough to do so. She wrote a letter outlining the problem and its history. She gave it to her husband and made him promise that if the plane crashed that he would make sure that the crash and airline were investigated. In addition, she not only made sure her mother knew the entire story but she took out an additional insurance policy to cover her young son in case she died in an accident. This flight attendant actually called her husband before each trip on this aircraft to say a "final" goodbye.

Fortunately, the plane was eventually pulled off the line after it lost an engine and had decompression problems. It has since been repaired. The flight attendant loves her job and loves flying for a regional. She told as many people about the door problem as she felt secure to tell. She was frightened to go to work but was convinced that she would lose her job if she "blew the whistle." No one should be placed in this situation.

Obviously, companies do not welcome constructive criticism from employees concerned about safety problems. The companies already know the thoroughness of their maintenance programs. Our union routinely makes suggestions for safety improvements at the carriers, but the answer all too often is: "The bottom line is how much is this going to cost?" Individual flight attendant reports of safety problems often go unheeded and those who take a stand, may be called in for counselling by their supervisor or worse, harassed or fired from their job.

We need a strong whistleblower law to protect our members when reporting safety problems and to protect the flying public. S. 436 would protect employees not just when they report a safety and health violation to government officials, but also when they take steps to ensure the safety of passengers by declining to participate in those violations, such as when they refuse to fly on an aircraft they think is unsafe. This bill also provides an important built in timetable for the government to take action ensuring expedited, fair resolutions of disputed whistleblower complaints.

It is time we fill the gaps in whistleblower protection laws and assure job protection to all workers who are willing to speak out on unlawful or hazardous activities that threaten the public health and safety. Congress must extend this protection to all employees. The Association of Flight Attendants thanks you and Senator Grassely on introducing this important legislation and enthusiastically endorses the Employee Health and Safety Whistleblower Protection Act. We look forward to working with you to pass S. 436.

Sincerely,

Susan Bianchi-Sand

Susan Bianchi-Sand
National President

Senator **Metzenbaum**. The hearing stands adjourned.

[Whereupon, at 11:40 a.m., the subcommittee was adjourned.]

○